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No. 01-1761

In The
Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY,

Petitioner,

versus

TRUDYS TUCKIER, Individually and as Administratrix of the Estate of Laura Dawn Tuckier, Deceased, and as Representative of the Wrongful Death Beneficiaries,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), which held that "courts of appeal should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards," binding on state courts by virtue of the Supremacy Clause of the United States Constitution?

II.

Does the federal due process right against "'grossly excessive' punishment," *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), guarantee freedom from grossly *imposed* punitive damages as well as from grossly *excessive* punitive damages?

III.

In May 1988, this Court upheld the constitutionality of Mississippi's Appeal Penalty Statute, Miss. Code Ann. §11-3-23, as being rationally related to "the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85, 108 S. Ct. 1645, 1654, 100 L. Ed. 2d 62, ___ (1988). In light of Mississippi's

QUESTIONS PRESENTED – Continued

enactment, since 1988, of several statutes that render §11-3-23 unnecessary to effectuate those objectives and that do not discriminate against those who appeal a money judgment or other judgment susceptible to pecuniary valuation, does Mississippi's Appeal Penalty Statute *now* violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Mississippi Supreme Court, of whose judgment Cooper Tire seeks review, were:

- Trudys Tuckier, Individually and as Administratrix of the Estate of Laura Dawn Tuckier, Deceased, and as Representative of the Wrongful Death Beneficiaries; and
- Cooper Tire & Rubber Company.

Cooper Tire & Rubber Company has no parent corporations. The following publicly held company owns 10% or more of Cooper Tire & Rubber Company's stock:

AXA Group
25, avenue Matignon
75008 Paris, France.

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PETITION FOR A WRIT OF CERTIORARI

Cooper Tire & Rubber Company respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi (App. 2-31) is unreported.

JURISDICTION

The Supreme Court of Mississippi entered its judgment on January 10, 2002 (App. 1). On April 4, 2002, the Supreme Court of Mississippi denied Cooper Tire & Rubber Company's motion for rehearing (App. 34). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

This petition for a writ of certiorari specifically draws into question the constitutionality of the Mississippi Appeal Penalty Statute, Miss. Code Ann. §11-3-23. Because neither the State of Mississippi nor any agency, officer, or employee thereof is a party, Cooper Tire hereby recites, pursuant to the Court's Rule 29(4)(c), that 28 U.S.C. §2403(b) may apply and is serving this petition on the Attorney General of the State of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding." U.S. Const. art VI, cl. 2.

2.

Mississippi's punitive damages statute provides, in pertinent part, "Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. §11-1-65 (App. 36).

3.

The Fourteenth Amendment of the United States Constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV, cl. 1.

4.

Mississippi's Appeal Penalty Statute provides:

In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any

> condemnee appealing from a special court of eminent domain in any circumstances.

Miss. Code Ann. §11-3-23 (App. 39).

STATEMENT OF THE CASE

In 1992, Cooper Tire & Rubber Company's plant in Texarkana, Arkansas, manufactured over 66,000 "P215/75R15 Hercules Terra Trac" steel-belted radial tires for use on the nation's roadways. On October 13, 1995, a piece of the tread and outer steel belt of one of those tires, overinflated and more than 32,000 miles into its life of service on a Ford Bronco II ("Bronco") never designed for tires as large as this one, tore away from the underlying rubber, leaving only about fifty percent of the tire's outer circumference intact. Although the tire remained fully inflated, the Bronco's driver, Laura Tuckier, lost control of her vehicle, which veered off the east side of Interstate 55 near Sardis, Mississippi, and rolled over. Tuckier was ejected from the Bronco and died.

Of the more than 66,000 "P215/75R15 Hercules Terra Trac" tires that Cooper Tire's Texarkana plant manufactured in 1992, only one – Tuckier's – was alleged to have been defective and to have caused an accident. Tuckier's family sued Cooper Tire and three other defendants: Ford Motor Company, the manufacturer of the Bronco; Johnny Ray Works, the seller of the Bronco (which had previously rolled over and been rebuilt); and Dillard Lowery d/b/a Auto Specialists, the seller of the tires. After the parties selected a jury, but before the trial, the Tuckiers settled and dismissed their claims against all of the defendants except Cooper Tire.

By the time the trial began, the Tuckiers had narrowed their product-liability theories against Cooper Tire

to one. They alleged that the subject tire was mismanufactured, which under Mississippi law required them to prove that the tire, when it left Cooper Tire's Texarkana plant in the fourth week of 1992, deviated from Cooper Tire's own manufacturing specifications. In support of their claim, the plaintiffs submitted what the Mississippi Supreme Court found was

> expert testimony that the subject tire did in fact fail due to the use of bad stock, which in turn failed to create a chemical bond in the tire. The Tuckiers also presented supporting testimony from two Cooper employees who stated bad stock was knowingly and intentionally used in tire manufacturing by Cooper (App. 6-7).

At the close of the compensatory damages phase of the trial, the jury returned a verdict in plaintiffs' favor and found that the Tuckiers had sustained $485,000 in compensatory damages, 68% of which the jury attributed to the fault of Cooper Tire.

The punitive damages phase of the trial immediately followed, in which the Tuckiers resubmitted by reference all evidence submitted during the compensatory damages phase, presented evidence of Cooper Tire's stipulated net worth, and attempted unsuccessfully to have Cooper Tire's director of technical relations admit that Cooper knew that defective tires were being produced in its Texarkana plant. The trial court denied Cooper Tire's motion for directed verdict on punitive damages, and the jury returned a 10 to 2 verdict finding Cooper Tire punitively liable and assessing punitive damages in the amount of $3,000,000. On November 17, 1999, the trial court entered a judgment in conformity with the jury's verdict (App. 32).

Pursuant to Mississippi procedure, Cooper Tire appealed to the Mississippi Supreme Court. In its original brief, Cooper Tire argued that the plaintiffs' evidence

failed to satisfy the "clear and convincing" standard that Mississippi's punitive damages statute demands as a requisite for punitive damages (App. 56-57). Cooper Tire also argued in its brief that the punitive damages award violated federal due process principles (a) as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (App. 60-65); (b) dictating that Mississippi may not punish or deter conduct in other states (App. 65-67), and (c) prohibiting inordinate emphasis on a defendant's wealth (App. 67-69). Additionally, Cooper Tire in its original brief "specifically identifie[d] as an issue and reserve[d] its right to argue that [the Mississippi Appeal Penalty Statute,] Miss. Code Ann. §11-3-23 is unconstitutional under the Constitutions of the United States and the State of Mississippi" (App. 69).

On January 10, 2002, the Mississippi Supreme Court issued an opinion affirming the trial court's judgment (App. 1-31). The supreme court upheld the punitive liability verdict solely on the basis that the plaintiffs had called two former Cooper Tire employees "who stated that in the course of their many years of employment with Cooper, they had personal knowledge that bad stock had been used in the manufacture of tires" (App. 22). Whether and to what extent any rational person would conclude that those two employees *could* have had such "personal knowledge" was apparently of no moment to the Mississippi Supreme Court, whose opinion gave blind deference to the jury: "The jury found the Tuckiers' witnesses and testimony to be more persuasive and more credible" (App. 22). The court did not address whether the plaintiffs' evidence – even *if* "more persuasive and more credible" than Cooper Tire's evidence – was "clear and convincing." Nor did the court conduct a *de novo* review of the punitive damages award pursuant to this Court's holding in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S.

424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), which the Court decided after Cooper Tire filed its original brief. Nor did the court so much as mention Cooper Tire's challenge to the constitutionality of the Mississippi Appeal Penalty Statute.

For these reasons and others, Cooper Tire filed a timely motion for rehearing (App. 70). In that motion, Cooper Tire asserted that pursuant to *Leatherman*, "appellate courts reviewing punitive damages awards must utilize a *de novo* standard of review to ensure that the award does not deny due process guaranteed by the United States Constitution" (App. 71). Cooper Tire also asserted that

> [c]lear and convincing requires evidence that is more than merely persuasive or credible, yet that was the standard applied by the majority, both in its review of the liability verdict and the findings supporting punitive damages. Error in basing a punitive damages award on plaintiffs' incompetent testimony and on the jury's 9 to 3 verdict is a deprivation of due process under the Mississippi and United States Constitutions (App. 79).

Finally, Cooper Tire argued that the supreme court's "affirmance of the judgment against Cooper, implicating §11-3-23, does not address Cooper's assertion that §11-3-23 is unconstitutional under the Constitutions of the United States and the state of Mississippi. This argument should be addressed on rehearing" (App. 81-82).

On April 4, 2002, the Mississippi Supreme Court denied Cooper Tire's motion for rehearing without opinion or reasons (App. 34).

REASONS FOR GRANTING THE PETITION

I. The Mississippi Supreme Court's knowing refusal to follow *Leatherman* and to review the jury's punitive damages award *de novo* conflicts with the decisions of other state courts of last resort and aggravates a split of authority among the states.

This Court, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, ___, 121 S. Ct. 1678, 1685-86, 149 L. Ed. 2d 674, ___ (2001), held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards." In *Leatherman*, the federal district court had evaluated a jury's award of punitive damages pursuant to the guidelines articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The United States Ninth Circuit Court of Appeals concluded that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Leatherman*, 532 U.S. at ___, 121 S. Ct. at 1680. Holding that the Ninth Circuit had applied the wrong standard of review, this Court vacated the appellate court's judgment and remanded the case for further proceedings. *Id.* at 1689.

In its original brief to the Mississippi Supreme Court before this Court decided *Leatherman*, Cooper Tire argued that the jury's punitive damages award violated due process principles guaranteed by the Fourteenth Amendment of the United States Constitution under standards that the Court set forth in *Gore*. (App. 60-65). Almost eight months *after* this Court decided *Leatherman*, the Mississippi Supreme Court, with scarcely any discussion of the

Gore criteria,[1] rejected Cooper Tire's argument and affirmed the jury's award, adhering to Mississippi's own standard of review: "On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court" (App. 24). That standard, of course, is part of one of the overall "schemes about which Justices expressed concern . . . in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988)." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 n.10, 111 S. Ct. 1032, 1045 n.10, 112 L. Ed. 2d 1172, ___ (1991). *See, Bankers Life*, 486 U.S. at 88, 108 S. Ct. at 1656 ("As the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.'") (O'CONNOR, J., concurring in part and concurring in the judgment).

In response to the Mississippi Supreme Court's decision, Cooper Tire filed a motion for rehearing, in which it asserted that *Leatherman* mandated a withdrawal of the court's opinion and a *de novo* review of the jury's punitive damage award (App. 71-73). The court denied Cooper Tire's motion without reasons (App. 34). Consequently, and contrary to what *Leatherman* mandated, the Mississippi

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[1] The Mississippi Supreme Court's purported finding of "sufficient evidence" to satisfy the "reprehensibility" and "ratio" tests of *Gore* was a mere *ipse dixit*. The court dispensed with the "reprehensibility" factor via a bald and startling proclamation that "when this one defective tire [out of more than 66,000] results in a person's death, there is sufficient evidence to establish this requirement" (App. 23). Likewise, the court made short shrift of *Gore*'s "ratio" consideration: "Comparing this situation with another matter, we have upheld that punitive damage awards equaling 150 times and 43 times the amount of actual damages" [*sic*] (App. 24). The court gave no mention at all to the third *Gore* factor: sanctions for comparable misconduct.

Supreme Court did not conduct a "thorough, independent review" of the punitive damages award in light of the *Gore* factors. *Leatherman*, ___ U.S. at ___, 121 S. Ct. at 1688. Such a review, as Cooper urged below and will urge again should this Court grant certiorari, would have revealed that the jury's punitive damages award was "grossly excessive" and in violation of federal due process principles (App. 74-77).

The Mississippi Supreme Court's unyielding refusal even to consider, let alone apply, *Leatherman* and to conduct a *de novo* review of the jury's punitive damages award utilizing the *Gore* criteria, conflicts with the decisions of other state courts of last resort and evinces a split of authority among the states regarding whether the holding of *Leatherman* is binding upon state courts by virtue of the Supremacy Clause of the United States Constitution.

When this Court announces a rule based upon the Constitution of the United States, that rule is binding upon state courts as well as federal courts by virtue of the Supremacy Clause. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 fn *, 84 S. Ct. 1042, 1043 fn *, 12 L. Ed. 2d 79, ___ (1964). *See also, U.S. v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, *Lawrence v. Woods*, 432 U.S. 983, 91 S. Ct. 1658, 29 L. Ed. 2d 148 (1971) ("Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal"). *Leatherman* ordered a federal appellate court to apply *de novo* review of a federal district court's determination of the constitutionality of a punitive damages award. In the wake of *Leatherman*, the courts of last resort of at least two states – Alabama and Utah – have deemed themselves bound by that decision. *See, Orkin Exterminating Co., Inc. v. Jeter*,

No. 1000710, 2001 WL 1391443 (Ala. 2001) (*Leatherman* applies to determination of whether punitive damages award violates federal due process principles) (citing *Acceptance Ins. Co. v. Brown*, No. 1991938, 2001 WL 729283 (Ala. 2001)); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676 (Utah 2001) (*Leatherman* applicable to *all* excessiveness claims regarding punitive damages awards). Several state appellate courts have reached similar decisions. *See*, *State Compensation Ins. Fund v. WPS, Inc.*, No. B116419, 2001 WL 1480552 (Cal. Ct. App. 2001) (California); *St. John v. Coisman*, 799 So. 2d 1110 (Fla. Ct. App. 2001) (Florida); *Time Warner Entertainment Co. v. Six Flags Over Georgia*, ___ S.E.2d ___, No. A00A0120, 2002 WL 472306 (Ga. Ct. App. 2002) (Georgia); *O'Neill v. Gallant Ins. Co.*, No. 5-00-0505, 2002 WL 819206 (Ill. Ct. App. 2002) (Illinois); *Stroud v. Lints*, 760 N.E.2d 1176 (Ind. Ct. App. 2002) (Indiana); *In re New Orleans Train Car Leakage Fire Litigation*, 795 So. 2d 364 (La. Ct. App. 2001) (Louisiana); *Allen v. Niehaus*, No. C-000212, 2001 WL 1589169 (Ohio Ct. App. 2001) (Ohio); *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106 (Or. Ct. App. 2001) (Oregon); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 641 N.W.2d 504 (Wis. Ct. App. 2002) (Wisconsin).

The Mississippi Supreme Court's refusal to deem itself similarly bound by *Leatherman* in this case – despite an obviously federal due process challenge to a punitive damages award – allows for but one conclusion: the Mississippi Supreme Court, unlike the high courts of Alabama and Utah and the appellate courts of at least nine other states, does not believe that this Court based its holding in *Leatherman* upon the Constitution of the United States.

At least one other state court – albeit not a court of last resort – has sided with the Mississippi Supreme Court's apparent stand. In *Seitzinger v. Trans-Lux Corp.*,

40 P.3d 1012 (N.M. Ct. App. 2001) (withdrawn from bound volume and ordered not for publication), 2001 WL 1748893, *cert. granted*, 40 P.3d 1008 (N. M. 2002), the New Mexico appellate court flatly rejected the notion that state courts must heed the *Leatherman* requirement of *de novo* review: "We do not interpret *Cooper Industries, Inc.* to impose de novo review as a matter of federal constitutional imperative. Rather, it appears to be an appellate procedural option for the federal courts. . . . We are thus free to apply our standard as a matter of constitutional law." Cooper Tire maintains that this limited application of *Leatherman* is wrong and that the punitive damages judgment in this case must therefore be vacated.

This case presents an opportunity for this Court to resolve the undeniable conflict between the Mississippi Supreme Court's outright rejection of *Leatherman* on the one hand and, on the other, the Alabama and Utah high courts' acceptance of *Leatherman* by force of the Supremacy Clause of the United States Constitution. Indeed, this Court is the only court that can provide authoritative resolution of that conflict. Certainly, no state court of last resort can. *See, e.g., Gore*, 517 U.S. at 571, 116 S. Ct. at 1597 ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all others in this particular") (quoting *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592, 26 L. Ed. 845 (1881)). Nor can any federal appeals court, for "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts." *Woods*, 432 F.2d at 1076.

Moreover, this Court *should* resolve the conflict and clarify whether and when its holding in *Leatherman* is binding upon state courts. So far, it has not done so. To be sure, the Court has vacated some state court judgments and remanded cases for further consideration in light of *Leatherman*. *See, e.g., San Paolo U.S. Holding Co., Inc. v.*

Simon, 532 U.S. 1050, 121 S. Ct. 2190, 149 L. Ed. 2d 1022 (2001); *Time Warner Entertainment Co. v. Six Flags Over Georgia*, ___ U.S. ___, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001); *National Union Fire Ins. Co. v. Textron Financial Corp.*, ___ U.S. ___, 122 S. Ct. 340, 151 L. Ed. 2d 256 (2001). As the Georgia appellate court observed of the *Time Warner* remand, however,

> [T]he U.S. Supreme Court's remand order in this case . . . was a mandate to reconsider our opinion "in light of" *Leatherman*. . . . The U.S. Supreme Court has recognized that such a "grant-vacate-remand" order ("GVR") is a deferential method of sending a case back to a lower tribunal so that it may reconsider its decision in light of an intervening legal event. See *Lawrence v. Chater*, 516 U.S. 163, 166-169, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996); see also *Hoover v. Kiowah Tribe*, 986 P.2d 516, 519 (Okla. 1999) (Wilson, J., dissenting). As Justice Scalia explained, "We left it to the state court to decide the effect of the intervening event, rather than following our usual practice of deciding that question for ourselves." *Lawrence v. Chater*, 516 U.S. at 179 (Scalia, J., dissenting). . . . Implicitly then, if a higher court remands a case to a lower court to decide an issue for itself, it logically follows that the higher court did not decide the issue pending before it.

Time Warner, 2002 WL 472306 at *2.

Meanwhile, decisions like that of the New Mexico appellate court in *Seitzinger* demonstrate that the split among state authority has genuine potential to propagate and – given that "[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damages awards" – likely will. *Haslip*, 499 U.S. at 61, 111 S. Ct. at 1066 (O'CONNOR, J., dissenting). Already, one scholar has quipped that "judicial review of excessive punitive damages awards 'now comes in both common-law and

constitutional flavors.'" *Time Warner*, 2002 WL 472306 at *2 (quoting Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (Oct. 2001)). The Mississippi Supreme Court's decision adds a "third flavor" to the mix: "common-law-covered constitutional." Quipping, however, does not render the proper review of punitive damages awards any less serious a matter, especially in product liability cases like this one, for as Justice O'Connor has observed,

> The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. [Citation omitted.] Similarly designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages. [Citation omitted.]

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282, 109 S. Ct. 2909, 2924, 106 L. Ed. 2d 219, ___ (1989) (O'CONNOR, J., concurring in part and dissenting in part). The Court should grant certiorari to review and resolve the existing conflict and to preempt further confusion.

II. If *Leatherman* is binding upon the states by virtue of the Supremacy Clause, then the Mississippi Supreme Court's knowing refusal to review the jury's punitive damages award *de novo* is in direct conflict with a binding decision of this Court.

The Mississippi Supreme Court denied Cooper Tire's motion for rehearing with full awareness of this Court's decision in *Leatherman* (App. 34). The Mississippi

Supreme Court's decision, therefore, amounts to nothing less than a knowing refusal to follow *Leatherman*. If, as Cooper Tire maintains, *Leatherman* imposed *de novo* review as a matter of federal constitutional imperative, then the Mississippi Supreme Court's decision in this case is directly contrary to a binding decision of this Court.

This Court has not hesitated to correct a state court judgment that runs afoul of a binding pronouncement of constitutional law. *See, e.g., Arkansas v. Sullivan*, 532 U.S. 769, 121 S. Ct. 1876, 149 L. Ed. 2d 994 (2001) ("Because the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent, we grant the State's petition for a writ of certiorari and reverse"). Thus, even this single instance of the Mississippi Supreme Court's failure to adhere to a binding constitutional pronouncement provides reason enough to grant certiorari. Alas, however, Cooper Tire's challenge to whether and how the Mississippi high court implemented constitutionally mandated federal due process principles in this case is no cry in the wilderness. In May 2002, the national law firm of Wiley Rein & Fielding analyzed Mississippi's legal system and asserted,

> As the state courts of Mississippi have become what the U.S. Court of Appeals for the Fifth Circuit has labeled a "mecca for plaintiffs' claims against out-of-state businesses," *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5th Cir. 2001), concerns have increased that the basic elements of "due process" have been sacrificed.

Wiley Rein & Fielding, *Is "Due Process" Afforded to Business Defendants in the Civil Justice System of Mississippi – an Analysis* (May 1, 2002), *at* http://www.litigationfairness.org. In January 2002, the United States Chamber of Commerce sponsored a Harris Interactive survey of more than 800 corporate counsels to rank state court liability systems in America; in the area of punitive

damages – and in other areas including overall treatment of tort and contract litigation, judges' impartiality, and judges' competence – Mississippi's judicial system ranked worst in the nation. *U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report* (January 11, 2002), *at* http://www.litigationfairness.org. Such studies are of course open to debate, but they evidence a general climate of unrest that renders especially appropriate the Court's correction of this instance of constitutional error by the Mississippi Supreme Court. The Court should grant certiorari to do so.

III. By rejecting Cooper Tire's argument that federal due process demands that appellate review, at a minimum, address whether the evidence satisfies *all* legal requirements for imposing punitive liability, the Mississippi Supreme Court effectively decided an important question of federal law that has not been, but should be, settled by this Court.

Mississippi's punitive damages statute, §11-1-65, provides that

> [p]unitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

Miss. Code Ann. §11-1-65. As basis for affirming the jury's decision to impose punitive liability on Cooper Tire, the Mississippi Supreme Court asserted that with evidence that "the jury found to be credible," or that the jury found "to be more persuasive and more credible," the plaintiffs had proven "at least 'willful, wanton or reckless disregard' for the safety of others" (App. 23). In its motion for

rehearing, Cooper Tire argued that "[e]ven if such evidence – 'more persuasive and more credible' than the opposing evidence – could constitute a 'preponderance,' it certainly was not 'clear and convincing'" (App. 79). The failure of the court even to discuss, let alone determine, whether plaintiffs' evidence was "clear and convincing" was, Cooper Tire argued, not merely a procedural blunder but "a deprivation of due process under the Mississippi and United States Constitutions" (App. 79).

The Mississippi Supreme Court's repudiation of Cooper Tire's federal due process challenge necessarily rejects Cooper Tire's argument that the federal due process right against "'grossly excessive' punishment," *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562, 116 S. Ct. 1589, 1592, 134 L. Ed. 2d 809, ___ (1996), guarantees freedom not only from grossly *excessive* punitive damages, but also from grossly *imposed* punitive damages. This federal question is one that this Court has not, but should, resolve. Indeed, the question has been long in coming.

The Court's jurisprudence has recognized and developed the constitutional principle that federal due process imposes substantive limits on the permissible size of punitive damages awards. In *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988), and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989), the petitioners sought this Court's determination that a punitive damages award assessed against them violated federal due process; in both cases, however, a majority of the Court held that the petitioners had not properly preserved the issue for review. In *Browning-Ferris*, Justice Brennan observed that the Court's holding left "the door open for a holding that the Due Process Clause constrains the *imposition* of punitive damages in civil cases brought by private parties." 499

U.S. at 280, 109 S. Ct. at 2923 (BRENNAN, J., concurring) (emphasis added).

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043, 113 L. Ed. 2d 1, ___ (1991) (emphasis added), a majority of the Court, noting its "concern about punitive damages that 'run wild,'" concluded,

> It would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their *imposition* is never unconstitutional. . . . One must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the *fixing* of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Although thus suggesting that the Fourteenth Amendment's guarantee of due process might constrain not only the *fixing*, but also the *imposition* of punitive damages, the *Haslip* Court ultimately focused on the *fixing* issue, holding that the punitive damages award in that case, although more than quadruple the amount of compensatory damages, did not "cross the line into the area of constitutional impropriety." 499 U.S. at 24, 111 S. Ct. at 1046.

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458, 113 S. Ct. 2711, 2720, 125 L. Ed. 2d 366, ___ (1993), the Court recognized that some punitive damages awards could be "so 'grossly excessive' as to violate the Due Process Clause of the Fourteenth Amendment." In contemplating a standard by which to determine whether a given punitive damages award was "grossly excessive," the Court returned

> to what we said . . . in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit

> every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." 499 U.S. at 18, 111 S. Ct. at 1043.

509 U.S. at 458, 113 S. Ct. at 2720. With the advent of *TXO*'s "grossly excessive" test, the Court focused further on the extent to which federal due process principles constrained the *size* of punitive damages, as opposed to their *imposition*. Still, however, the Court did not reject the notion that in some egregious cases, *any* amount of punitive damages awarded might be "grossly excessive." On the contrary, the *TXO* Court briefly considered, but rejected, the merits of the petitioner's claim that the fact, as opposed to the amount, of the punitive damages in *TXO* was unconstitutional due to inadequate appellate review. 509 U.S. at 465, 113 S. Ct. at 2724.

The constitutional focus on how many punitive dollars were permissible, as opposed to whether any were permissible at all, continued with *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 2341, 129 L. Ed. 2d 336, ___ (1994), in which the Court held that "Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment." In *Gore*, 517 U.S. at 568, 116 S. Ct. at 1595, the Court, again focusing on the size of punitive damages awards, granted certiorari because it "believed that a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."

Dissenting from the Court's "identification of a 'substantive due process' right against a 'grossly excessive' award," Justice Scalia in *Gore* predicted that the Court would eventually have to answer, in some form or another, the very question that Cooper Tire brings today:

> The relationship between judicial application of the new "guideposts" and jury findings poses a

> real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to *how* reprehensible petitioner's conduct was (*i.e.*, how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible *at all* (*i.e.*, that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably *imposed* awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment.

Gore, 517 U.S. at 606-607, 116 S. Ct. at 1614 (SCALIA, J., dissenting).

This case presents a unique opportunity to take up Justice Scalia's *Gore* gauntlet, to lift a lamp beside the door that *Browning-Ferris* left open, and to decide, finally, whether the "Due Process Clause constrains the *imposition* of punitive damages in civil cases brought by private litigants." *Browning-Ferris*, 499 U.S. at 280, 109 S. Ct. at 2923 (BRENNAN, J., concurring). It remains inarguably true that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Oberg*, 512 U.S. at 432, 114 S. Ct. at 2340 (1994). The Court's punitive-damages decisions, however, declare significant constitutional safeguards against only quantitative, and not qualitative, arbitrary deprivations. Paradoxically, then, the Court's rulings suggest that federal due process principles may protect a hypothetical defendant hit with a $10,000,000

punitive damages award if that award should have been only $5,000,000, but if under controlling law that same defendant should not have been assessed punitive damages *at all*, he is, constitutionally speaking, out of luck. The Court should grant certiorari to resolve that paradox.

The relief that Cooper Tire seeks need be neither revolutionary nor extraordinary. Cooper Tire does not, for example, ask the Court to reverse its holding in *Haslip* and declare that "the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Haslip*, 499 U.S. at 17, 111 S. Ct. at 1043. Cooper Tire does not ask the Court to declare the "constitutional necessity of imposing [any given] standard of proof of punitive damages" – a notion that the Court rejected in *Haslip*. 499 U.S. at 23 fn. 11, 111 S. Ct. at 1046 fn. 11. Cooper Tire does not ask the Court to require of state appellate courts any form of "heightened scrutiny" of judgments imposing punitive liability – a notion that the Court rejected in *TXO*.[2] 509 U.S. at 455, 113 S. Ct. at 2719. And Cooper Tire does not ask the Court to announce a sweeping rule that would render "*every* dispute as to evidentiary sufficiency in a state civil suit . . . a question of constitutional moment, subject to review in this Court." *Gore*, 517 U.S. at 607, 116 S. Ct. at 1614 (SCALIA, J., dissenting) (declaring the proposition "stupefying").

Rather, Cooper Tire merely seeks confirmation that in a civil case in which a defendant has been found liable for

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[2] Cooper Tire here distinguishes between a judgment *imposing* punitive liability and a judgment *fixing* punitive damages. Cooper Tire maintains that the Court's holding in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), requires state courts to review the *amount* of punitive damages awards *de novo*, utilizing the *Gore* guideposts.

punitive damages and has appealed that finding as allowed by state law, the Due Process Clause of the Fourteenth Amendment requires the appellate court to conduct a review of that finding – using whatever standard of review the state has prescribed – that at the very least *addresses* whether the evidence satisfies *all* legal requirements for imposing punitive liability. In *this* case, the Mississippi Supreme Court failed to do that, because as its opinion reveals, the court – although it found that plaintiffs' evidence of "willful, wanton or reckless disregard" was "more persuasive and more credible" than Cooper Tire's evidence to the contrary – did *not* find, or even *address*, whether plaintiffs' evidence was "clear and convincing" as demanded by Mississippi's punitive damages statute, Miss. Code Ann. §11-1-65, as an absolute requisite to punitive liability (App. 21-25). That patent failure at all to evaluate whether a critical element of punitive liability had been established, coupled with what Cooper maintains is the underlying failure of evidence to establish that element, renders the judgment in this case not simply unfair, but also unconstitutional.

Such adequate review was critical in this case to ensure that the imposition of punitive liability would not be arbitrary. True, Mississippi's punitive damages statute does require "clear and convincing evidence" of punitive liability, a standard of which this Court has found "[t]here is much to be said in favor." *Haslip*, 499 U.S. at 23, 111 S. Ct. at 1046; *see also, Oberg*, 512 U.S. at 433, 114 S. Ct. at 2341 ("clear and convincing standard of proof . . . is an important check against unwarranted imposition of punitive damages"). But neither the statute itself, nor the trial court's charge (App. 86), gave the jury *any* guidance as to what "clear and convincing" *means*, and consequently gave no assurance that Justice O'Connor's vision – that "[o]n a symbolic level, the higher evidentiary standard would signal to the jury that it should have a high level of

confidence in its factual findings before imposing punitive damages," *Haslip*, 499 U.S. at 58, 111 S. Ct. at 1064 (O'CONNOR, J., dissenting) – could be realized.[3] Thus, as Justice Brennan observed of the jury instruction given in *Browning-Ferris*, the charge in this case "appears to have been a correct statement of . . . law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris*, 492 U.S. at 281, 109 S. Ct. at 2923 (BRENNAN, J., concurring). Nor does Mississippi's "clear and convincing evidence" requirement by itself provide significant constraint or protection against arbitrary results on appeal, because just like Justice Breyer noted of Alabama's punitive damages statute in *Gore*, the Mississippi standards "as the [Mississippi Supreme Court has] authoritatively interpreted them, and as their application in this case illustrates, . . . impose little actual constraint." *Gore*, 517 U.S. at 589, 116 S. Ct. at 1606 (BREYER, J., concurring).

The suggestion that as a matter of constitutional due process, a civil defendant to whom the state affords an appeal is entitled to *some* appellate determination that *every* element of punitive liability has been established is hardly shocking. In *Browning-Ferris*, the Court observed that "it is not disputed that a jury award may not be upheld if it was the product of bias or opinion, or *if it was reached in proceedings lacking the basic elements of fundamental fairness.*" 492 U.S. at 276, 109 S. Ct. at 2921 (emphasis added). In *Haslip*, Justice Scalia noted that "it

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[3] "Clear and convincing" of course can be and has been ascribed meaning, as Cooper Tire noted in its motion for rehearing (App. 79-81).

has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury; and . . . in my view *a process that accords with such a tradition* and does not violate the Bill of Rights . . . constitutes 'due' process" *Haslip*, 499 U.S. at 24-25, 111 S. Ct. at 1047 (SCALIA, J., concurring in judgment) (emphasis added). Justice Scalia continued,

> If the government . . . chooses to *depart* from historical practice, it does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process. *Hurtado* [*v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)] provided scant guidance. It merely suggested that due process could be assessed in such cases by reference to "those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions, 100 U.S. at 535, 4 S. Ct. at 120 (emphasis added).

Haslip, 499 U.S. at 31-32, 111 S. Ct. at 1050 (SCALIA, J., concurring in judgment). In *TXO*, 509 U.S. at 457, 113 S. Ct. at 2720 (emphasis added), the Court explained that "*[a]ssuming that fair procedures were followed*, a judgment that is a fair product of that process is entitled to a strong presumption of validity."

Such observations state the constitutionally obvious: proceedings that provide the basic elements of fundamental fairness; proceedings that allow punitive damages where evidence satisfies the legal requirements for imposing them; proceedings that observe the fundamental principles of liberty and justice; proceedings in which fair procedures are followed – all are proceedings that presumably satisfy due process. But by negative implication, those same observations provide the seeds from which

Cooper Tire's question sprouts: proceedings that *fail* to provide the basic elements of fundamental fairness; proceedings that allow punitive damages where the evidence *fails* to satisfy the legal requirements for imposing them; proceedings that *deny* the fundamental principles of liberty and justice; proceedings in which fair procedures are *not* followed – all are proceedings that do *not* enjoy a presumption of constitutionality. *See*, *Oberg*, 512 U.S. at 430, 114 S. Ct. at 2339 ("abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause"). Because the Mississippi Supreme Court in this case abrogated the well-established common-law protection of adequate (whether correct or not) appellate review, its judgment is not entitled to a presumption of constitutionality. Indeed, it is unconstitutional, and the Court should grant certiorari to declare it so.

IV. By rejecting Cooper Tire's equal protection challenge to the continuing constitutionality of the Mississippi Appeal Penalty Statute, the Mississippi Supreme Court decided an important federal question that has not been, but should be, settled by this Court.

The Mississippi Appeal Penalty Statute, Miss. Code Ann. §11-3-23, "requires unsuccessful appellants from money judgments, as well as from several other categories of judgments whose value may readily be determined, to pay an additional assessment of 15% of the judgment." *Bankers Life*, 486 U.S. at 80, 108 S. Ct. at 1651-52. In this case, the statute will exact an additional penalty of $499,350 from Cooper Tire because Cooper Tire's exercise of its right to appeal a $3,329,000 judgment ended in a 5 to 3 decision by the Mississippi Supreme Court, with a ninth

judge (who presided over the trial) not participating (App. 2-31).

In both its original brief to the Mississippi Supreme Court (App. 69), and its later motion for rehearing (App. 81-85), Cooper Tire asserted that the Mississippi Appeal Penalty Statute, because its application is automatic and because it discriminates among appellants, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Specifically, Cooper Tire questioned the continuing validity of this Court's holding in *Bankers Life*, noting that since the Court upheld the statute against an equal protection challenge in 1988, Mississippi had enacted several provisions that rendered §11-3-23 unnecessary to effectuate its purported purposes. Because the Mississippi Supreme Court denied Cooper Tire's appeal and its motion for rehearing, it necessarily rejected this constitutional challenge to §11-3-23, although it nowhere acknowledged that the challenge had even been raised.

By dismissing Cooper Tire's equal protection challenge to Mississippi's Appeal Penalty Statute, the Mississippi Supreme Court effectively answered "no" to an important federal question that this Court has not, but should decide. The Court should grant certiorari because Cooper Tire's constitutional challenge to §11-3-23 directly questions the continuing validity of this Court's holding in *Bankers Life*.[4]

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[4] Cooper Tire also asserted that the statute's application in this case violated federal due process principles because the penalty it imposes in this instance is grossly excessive (App. 82). For example, the nearly half-million-dollar penalty that the statute prescribes in this case is approximately one and one-half times greater than the compensatory damages that the jury awarded the plaintiffs. Should this Court grant certiorari, Cooper Tire intends to urge this due process argument again.

In *Bankers Life*, the Court relied heavily on *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), to hold that "the means chosen in §11-3-23 are reasonably related to the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources." 486 U.S. at 85, 108 S. Ct. at 1654. *Lindsey* had struck down an Oregon statute "that required tenants challenging eviction proceedings [under the Oregon Forcible Entry and Wrongful Detainer ("FED") Statute] to post a bond of twice the amount of rent expected to accrue pending appellate review." *Bankers Life*, 486 U.S. at 82, 108 S. Ct. at 1653. The Court acknowledged,

> We do not question here reasonable procedural provisions to safeguard litigated property, *cf. National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 75 S. Ct. 92, 99 L. Ed. 46 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied.

Lindsey, 405 U.S. at 78, 92 S. Ct. at 877. The Court found, however, that the statute's double-bond requirement was "unnecessary" to effectuate Oregon's stated purpose to "preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession." 405 U.S. at 77-78, 92 S. Ct. at 876. Other provisions of Oregon law – including those requiring an appeal bond and allowing a landlord to sue for payment of back rent – already allowed Oregon to realize its stated purposes without imposing the double-bond requirement, which "heavily burden[ed] the statutory right of an FED defendant to appeal." *Id.* Consequently, the double-bond requirement was unconstitutional because the actual presence of other, less burdensome,

means of achieving the statute's stated ends rendered its peculiar treatment of FED appellants irrational.

When the Court decided *Bankers Life* in May 1988, it held that the legitimacy of Mississippi's stated purposes in enforcing §11-3-23 "cannot seriously be doubted." 486 U.S. at 82, 108 S. Ct. at 1652. Moreover, the Court held that a "rational connection" existed between "the statute's objective and Mississippi's choice to impose a penalty only on appellants from money judgments or judgments the money value of which can readily be determined," because an attempt to "deter frivolous appeals from other kinds of judgments . . . would impose a considerable cost in judicial resources." 486 U.S. at 83-84, 108 S. Ct. at 1653. The Court did *not* find, however, nor did it discuss, whether other provisions of Mississippi law might render the Appeal Penalty Statute "unnecessary" to effectuate those purposes and thereby render §11-3-23 – like Oregon's double-bond statute in *Lindsey* – unconstitutional. In his dissent, however, Justice Blackmun concluded that §11-3-23 was irrational because it was, like Oregon's double-bond statute, "unnecessarily broad." 486 U.S. at 92 fn. 4, 108 S. Ct. at 1658 fn. 4 (BLACKMUN, J., dissenting). The dissent recognized that the Mississippi Supreme Court recently had adopted Mississippi Supreme Court Rule 38, which provided "for sanctions for the taking of a frivolous appeal in any civil case to which §11-3-23 does not apply," and which therefore reflected "Mississippi's recognition that frivolous appeals can be specifically identified." *Id.* Rule 38, however, was not yet in effect when the petitioner in *Bankers Life* appealed nor when the case was argued before the Court.

Fourteen years have passed since the Court decided *Bankers Life*. During that time, Mississippi has effected several legal provisions which provide an arsenal of monetary awards to prevailing parties, both as a matter of course and in instances in which a position is found to be

frivolous or unjustified. These provisions include mandatory assessments of interest and costs, *see*, Mississippi Rule of Appellate Procedure 36 (App. 49), Miss. Code Ann. §75-17-7 (App. 47), Miss. Code Ann. §11-53-55 (App. 40), as well as the potential for various sanctions, *see*, Mississippi Rule of Civil Procedure 11 (App. 47), Mississippi Rule of Appellate Procedure 38 (App. 50), Mississippi Litigation Accountability Act of 1988, Miss. Code Ann. §11-55-1, *et seq.* (App. 40-47). All of these provisions – as Cooper Tire argued in its motion for rehearing (App. 81-85) and will argue again should this Court grant certiorari – serve the state's "objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources," *Bankers Life*, 486 U.S. at 85, 108 S. Ct. at 1654, as well as or (in cases of minor awards) better than the Appeal Penalty Statute, and unlike §11-3-23, they do *not* discriminate against those who appeal a money judgment or other judgment susceptible to pecuniary valuation. Consequently, Mississippi's Appeal Penalty Statute, by virtue of the state's enactments since this Court decided *Bankers Life*, is now subject to equal protection challenge for reasons substantially similar to those that led the Court to strike down the double-bond statute in *Lindsey*. In short, the continuing validity of *Bankers Life* is here challenged. This Court should grant certiorari to resolve whether its own precedent remains viable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10, 2002

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 10th day of January, 2002.

Supreme Court Case # 2000-CA-00404-SCT
Trial Court Case # CV-97-64-CP1

Cooper Tire and Rubber Company v. Trudys Tuckier, Individually, and as Administratrix of the Estate of Laura Dawn Tuckier, Deceased, and as Representative of the Wrongful Death Beneficiaries

Affirmed. Appellant taxed with costs of appeal.

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 20000-CA-00404-SCT

COOPER TIRE AND RUBBER COMPANY

v.

TRUDYS TUCKIER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LAURA DAWN TUCKIER, DECEASED, AND AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES

DATE OF JUDGMENT:	11/17/1999
TRIAL JUDGE:	HON. GEORGE C. CARLSON, JR.
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	SAM E. SCOTT KEITH R. RAULSTON VIRGINIA McBRYDE TODD
ATTORNEYS FOR APPELLEE:	D. BRIGGS SMITH CLYDE TAB TURNER MICHAEL DALE COOKE
NATURE OF THE CASE:	CIVIL-WRONGFUL DEATH
DISPOSITION:	AFFIRMED – 01/10/2002
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC

McRAE, PRESIDING JUSTICE, FOR THE COURT:

¶ 1. On October 13, 1995, Laura Dawn Tuckier ("Laura") was killed when her Bronco II sport-utility-vehicle rolled over and crashed. Following this accident, it was determined

that one of Laura's tires had separated and that this tire had been manufactured by Cooper Tire and Rubber Company, Inc. ("Cooper"). Further, Cooper used "bad stock" which can cause the tread to separate because of the improper bonding of the tire and tread. Laura's wrongful death beneficiaries, her father, mother, and brother ("Tuckiers"), brought suit against a number of defendants. However, the only remaining defendant at trial and on appeal is Cooper. Cooper raises several issues for review which are summarized as follows: whether the trial court should have granted a directed verdict for Cooper because the Tuckiers failed to prove a prima facie case under the Mississippi Products Liability Act (MPLA); whether certain evidence admitted and arguments presented by the Tuckiers constitute reversible error; whether the compensatory damages award was proper; and whether the punitive damages award was proper. Finding no error, we affirm the trial court.

FACTS

¶ 2. On October 13, 1995, Laura's Bronco II's rear tire tread separated and caused her to lose control and crash, and subsequently Laura died. This tire was manufactured by Cooper Tire and Rubber Company, Inc. ("Cooper"). On May 27, 1997, Laura's wrongful death beneficiaries ("Tuckiers") filed suit against several defendants, including Ford Motor Company, the manufacturer of the Bronco; Johnny Ray Works, the seller of the vehicle; Cooper, manufacturer of the subject tire; and Dillard Lowery d/b/a/ Auto Specialists, who sold the tires to Laura's father. Cooper ("Cooper") was the only remaining defendant at trial and on appeal. The claims against the other defendants were settled prior

to trial. However, the jury apportioned fault to Ford Motor Company in its verdict.

¶ 3. Eyewitnesses to the accident testified that Laura's Bronco moved into the left lane of traffic, immediately back to the right and then began to flip and continued to flip until it was off the interstate. There was no swerving of the vehicle from left to right, but the vehicle made a sharp turn to the right and then flipped off the highway. An eyewitness further testified that she noticed nothing wrong with the vehicle until she noticed dust and dirt coming from under the left tire.

¶ 4. The Tuckiers' expert witness, Max Nonnamaker ("Nonnamaker"), testified that his examination of the tire indicated that Laura had no notice or warning that something was wrong with the tire. The primary reason for this lack of warning was the steel belts of the tires. Because the tire separation was between the steel belts, the outer steel belt was still stiff, and Laura probably would not have heard anything. Nonnamaker further testified that the tire separation was not due to operating conditions and that the separation would have created a "real vehicle handling control problem."

¶ 5. In November 1999, the trial was held in the Circuit Court of Panola County. The verdict apportioned fault to the parties as follows: Lawrence Tuckier (Laura's father), 0%; Laura Tuckier, 2%; Johnny Ray Works, 0%; Dillard Lowery, d/b/a/ Auto Specialists, 0%; Ford Motor Company, 30%; and Cooper Tire, 68%.

¶ 6. The jury awarded the Tuckiers compensatory damages in the amount of $485,000.00, $329,000.00 to be paid by Cooper. The jury also awarded the Tuckiers $3 million

in punitive damages to be paid by Cooper. Aggrieved, Cooper now appeals.

STANDARD OF REVIEW

¶ 7. When reviewing the denial of a directed verdict, the Court considers the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be drawn from the evidence. If the facts point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. However, if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.,* 743 So.2d 954, 960 (Miss. 1999). The standard of review for denial of a motion for mistrial is abuse of discretion by the trial court. *Bass v. State,* 597 So.2d 182, 191 (Miss. 1992).

LAW

I. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED A DIRECTED VERDICT FOR COOPER BECAUSE THE TUCKIERS FAILED TO PROVE A PRIMA FACIE CASE UNDER THE MISSISSIPPI PRODUCT LIABILITY ACT (MPLA).

¶ 8. Cooper complains that the Tuckiers did not establish a prima facie case under the Mississippi Products Liability Act ("MPLA"), Miss. Code Ann. § 11-1-63(a)(i)(1) (Supp.2001). While the Tuckiers assert that the use of bad

stock in the manufacturing process led to Laura's accident and subsequent death, Cooper states this argument fails due to the fact that the Tuckiers did not set forth Cooper's specifications for the manufacture of its tires and make appropriate comparisons with the relevant factors in this case. Cooper also asserts that the Tuckiers did not successfully prove a case of negligence against it. The Tuckiers did make a prima facie case under the MPLA by asserting that Cooper did in fact use bad stock in the manufacturing of its tires and that under the MPLA, a products liability act, proof of a negligence case is not necessary.

¶ 9. Miss. Code Ann. § 11-1-63(a)(i)(1) (Supp. 2001), states:

> In any action for damages caused by a product except for commercial damage to the product itself:
>
> (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
>
> (i)1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications; . . . .

¶ 10. Cooper refers to the analogy of the recipe for a cake, arguing that, "if the cake tastes bad, one must examine the recipe in order to determine whether the baker failed to follow the recipe." While the Tuckiers state that if the ingredients are bad, whether the recipe was followed is irrelevant. The Tuckiers did meet their burden of proof when they put on expert testimony that the

subject tire did in fact fail due to the use of bad stock, which in turn failed to create a chemical bond in the tire. The Tuckiers also presented supporting testimony from two Cooper employees who stated bad stock was knowingly and intentionally used in tire manufacturing by Cooper. The Tuckiers put on sufficient proof to uphold the jury verdict, and the trial court did not err by denying Cooper's motion for directed verdict.

¶ 11. The Tuckiers called as their expert witness, Max Nonnamaker ("Nonnamaker"), an expert in the field of tire manufacturing, who had analyzed over 3,000 tires, including hundreds of radial tires during his twenty-six-year career. Nonnamaker stated that he made an independent examination of the subject tire and did not base his findings upon the testimony of former employees Jimmy Oats and Richard Angell, as Cooper suggests.

¶ 12. Nonnamaker completed an independent forensic examination of the tire, and he explained his procedure while testifying. When asked to explain what he looked for in examining a tire such as the subject tire, Nonnamaker stated,

> We look at everything. In other words, the first thing that I do is I take the unit and look at it very carefully at all of the exposed areas. Then I go back and record on a sheet the markings that are present and the conditions by documenting what their location is on the tire, and then I finish up by taking photographs to document those conditions . . . . We look for everything, and then we interpret whatever we find. And not only do we interpret what we find, but it also has to be consistent with what is present in the balance of the tire in the wheel. In other words, you just can't pick out one area and say this is so and so,

> or you can say that, but you would then be overlooking how it ties in with the balance of the tire. So everything about the tire is significant. It's just a matter of – It's like running an autopsy on a person. It's the same thing.

¶ 13. Nonnamaker further stated that he had found a large area where the tire actually separated and that there was a breakdown in the rubber between the two steel belts in this area. He found a similar area on the opposite side of the tire and stated that the fact that the breakdown appears on opposite sides of the tire indicates that it was due to something built into the tire, rather than operating conditions. He further testified that the tire peeled and ripped apart due to the stock that was used to build the tire. Although the tire had bonded mechanically, it had not bonded chemically due to the bad stock used by Cooper in the manufacturing process.

¶ 14. Nonnamaker's testimony refuted Cooper's assertion that the tire had been allowed to run after it was torn by road damage. Nonnamaker did not find that the tire had been over-inflated or under-inflated, and he found no evidence of a cut that would explain why the tire had peeled apart. He also found that the inner steel belt had not been penetrated and that if it had, he would have expected to have seen the tire cut in a centralized location, but he did not find this during his examination.

¶ 15. Cooper asserts that because Laura's Bronco was towed to a service station following the accident and because the tire was not deflated, the tire was not mismanufactured, but was damaged by road debris. Nonnamaker also provided testimony to refute this assertion when he observed the tire pressure. After receiving the tire for inspection, Nonnamaker observed the tire pressure

was 42 pounds. When he checked the pressure again, some 42-52 days later, he found the pressure had decreased by one pound, which he stated was a normal occurrence. This led Nonnamaker to conclude that the tire had not been damaged or punctured from something outside the tire, as the tire still retained pressure, but that the tire had been damaged from an element inside the tire. This also led him to the conclusion that bad stock had been used in the manufacture of this tire.

¶ 16. Cooper faults Nonnamaker's testimony because he did not perform a chemical test of the subject tire to determine whether old stock was in fact used in the manufacturing of this tire. However, Cooper also produced a witness who testified about his tests for tire inspection, which were quite similar to the tests done by Nonnamaker and who also did no chemical test. In addition, Nonnamaker's testimony is supported by two witnesses, who were former employees of Cooper.

¶ 17. Cooper criticizes Nonnamaker's testimony because Nonnamaker did not perform any chemical tests of the subject tire. The Tuckiers stated that no back-tests of the tire could be performed after the tire had been made. At oral argument before this Court, counsel for Cooper admitted that there could be no chemical tests of the tire after it had been formed, and this agrees with the statements made by the Tuckiers. No chemical tests or "back-testing" of the tire could be performed after the tire had been made.[1]

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[1] Oral arguments in this case were held before the Court on May 23, 2001.

¶ 18. Nonnamaker also testified that by looking at the Department of Transportation number on the tire, he could identify the date the tire was manufactured and that it came from the Cooper Texarkana plant. He testified that the tire was manufactured in the fourth week of January 1992, a period following a holiday shut-down of the plant where stock was allowed to sit, and this further supported his assertion that the tire had been manufactured with bad stock.

¶ 19. Cooper bases the majority of its argument on this issue upon the credibility of two witnesses presented by the Tuckiers, Jimmy Oats and Richard Angell. Cooper states that the testimony of both of these witnesses should not have been allowed because neither had personal knowledge of tire manufacturing at the plant when the subject tire was manufactured in January 1992. However, Oats and Angell both testified that based upon their long-time employment with Cooper, both had personal knowledge of the use of bad stock in the tires. Cooper presented witnesses who testified that this bad stock would have been used by the company prior to the fourth week in January. Cooper also thoroughly cross-examined Oats and Angell as to the status of their employment at the plant in 1992 and about grievances each had filed with Cooper. However, the jury believed the testimony of the Tuckiers' witnesses. The Tuckiers did put on a prima facie case, and this issue is affirmed.

II. WHETHER CERTAIN EVIDENCE ADMITTED AND ARGUMENTS PRESENTED BY TUCKIER CONSTITUTE REVERSIBLE ERROR.

¶ 20. Cooper presents this issue in terms of four sub-issues, which are A.) plaintiffs' witnesses were invited to make improper references to religious belief to enhance their credibility; B.) plaintiffs presented false, irrelevant, and prejudicial references to other claims against Cooper; C.) plaintiffs improperly criticized Cooper's objections to discovery; and D.) plaintiffs presented the opinion of an expert who was not called as a witness, thereby placing before the jury matters not in evidence. Cooper also made four motions for mistrial during the course of this trial, three of which were based upon the above mentioned sub-issues or combinations of these sub-issues.

A.) Plaintiffs' witnesses were invited to make improper references to religious belief to enhance their credibility.

¶ 21. The Tuckiers called two former Cooper employees to the stand and questioned each about their motives for testifying in this case. On direct examination of witness Jimmy Oats, counsel for the Tuckiers asked, "point-blank what brings you all the way to Batesville, Mississippi, to testify in a case that involves people that you don't even know?" Over defense counsel's objection, Oats answered,

> Well, I don't – I understand that I can't live with myself if I don't tell the truth and don't try to do what I think the Lord would have me do, and I think the Lord wants me to tell the truth and be honest about what I do and the way I live my

> life. And I don't – I'm sorry. I don't think He would like for me to let things go and not stand up for what I know is right and what I believe is right without being punished for it.

¶ 22. Another former employee, Richard Angell, was similarly questioned on re-direct examination when counsel asked, "And why are you here testifying?" Angell's response was, "it's just too few a people that are brave enough to do it, I guess. I just felt like it was a Christian responsibility." Cooper did not object to this exchange.

¶ 23. Cooper objects to these questions and answers stating that they were in violation of M.R.E. 610 on religious beliefs and opinions, which states, "evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced." However, the comment to Rule 610 states, "this rule prohibits impeaching a witness by questioning him concerning his religious beliefs and opinions. It does not prohibit questioning him as to those beliefs and opinions when testing his bias or interest."

¶ 24. Cooper argues that these questions were asked in order to bolster the witnesses credibility, which would be in violation of the rules of evidence, *i.e.*, M.R.E. 608(a). However, Cooper attempted to discredit these witnesses as early as its opening statement, when it described the witnesses as disgruntled employees who were motivated by animosity for Cooper. In Cooper's opening statement, it stated that Oats and Angell had filed many grievances with Cooper while employed because they became dissatisfied with the discipline or money they were receiving from the company. Cooper also stated that Oats and Angell did not file grievances concerning the tires made nor their

components. Therefore, from the beginning, Cooper presented their two former employees to the jury as ones testifying because of animosity towards Cooper and therefore "opened the door".

¶ 25. It is clear from the record that the Tuckiers questioned their witnesses for the purposes of establishing their motives for testifying in this matter and for rebutting the purported motives presented to the jury during Cooper's opening statement. Therefore, the Tuckiers were not acting in violation of Rule 610 on religious beliefs, and the trial court properly allowed these questions and the witness responses. The Tuckiers did not ask their witnesses specifically about their religious beliefs or opinions, but simply their motivations for testifying. The trial court is affirmed as to this sub-issue.

B.) Plaintiffs presented false, irrelevant, and prejudicial references to other claims against Cooper.

¶ 26. Cooper cross-examined the Tuckiers' expert witness, Max Nonnamaker, as to his prior testimony in other cases. On re-direct examination, the Tuckiers attempted to rehabilitate Nonnamaker by questioning him as to his familiarity and involvement in other cases. Cooper contends that the Tuckiers violated a pre-trial order that required the Tuckiers to approach the bench and lay a foundation showing substantial similarity of other accidents prior to introduction of these accidents before the jury. However, Cooper opened the door for these questions when it cross-examined Nonnamaker and questioned him as to his involvement in prior cases. Cooper argues that although it did question Nonnamaker as to his previous experiences in testifying the Tuckiers went beyond the

scope of this cross-examination by questioning Nonnamaker about other cases where victims were injured as a result of a tire separation.

¶ 27. Cooper summarizes its position clearly, as it states in its brief, "As is apparent from the questions and their context, the purpose of these questions was to impeach Mr. Nonnamaker by showing the following: he had an ongoing professional relationship with plaintiffs' counsel; he invariably found tires defective; a trial judge once characterized his testimony as completely incredible; his work is overwhelmingly for plaintiffs, rather than manufacturers; in one case plaintiffs' counsel authored his report; and two courts have excluded his testimony as not qualified." The Tuckiers' re-direct of Nonnamaker was as follows.

> Q. . . . Do you recall whether one of those, the Cleghorn tire, involved people, in fact, there were two people killed, and it involved a tire made in the Texarkana plant of Cooper Tire?
>
> A. Yes, sir.
>
> Mr. Raulston: Objection, Your Honor. Object and move to strike and ask the jury be instructed to disregard it. He's trying a case within a case.
>
> Mr. Turner: He opened the door.
>
> The Court: Overruled.
>
> Mr. Turner: Thank you.
>
> Q. (By Mr. Turner) Do you recall a case called *Swank v. Ford* ?
>
> A. Yes, sir.

Q. And do you recall that Cooper was likewise involved in that case?

A. I don't recall who the manufacturer was.

Q. Do you recall another case involving Cooper Tire from Texarkana that involved a tire that failed from this same time period involving a little boy that was 12 years old that ended up with severe brain damage because of one of the tires?

A. Yes, sir.

Q. And do you recall that that tire was likewise manufactured defectively?

A. Yes, sir.

Q. And do you recall whether or not Cooper settled that case?

A. Yes, sir.

Mr. Raulston: Your Honor, same objection.

The Court: It will be noted for the record. It will be overruled.

Q. (By Mr Turner) Now, do you recall a case called *Walsh,* versus a variety of defendants?

A. No, I don't.

Q. Do you recall whether the *Walsh* case involved a young college student paralyzed from the neck down because of a Cooper tire made in Texarkana.

Mr. Raulston: Your Honor, he's already said he didn't recall. It's improper leading of a witness. He's trying to testify. The witness said he didn't recall the case.

Mr. Turner: He opened the door to this.

The Court: Okay. The witness can recall. If he doesn't, that's fine, but I overrule the objection.

Q. (By Mr. Turner) Do you recall?

A. Yes, I do.

¶ 28. Cooper contends that the *Swank* case, the twelve-year-old boy case, and the *Walsh* cases are irrelevant and beyond the scope of re-direct examination because the *Swank* case is "absolute fiction," the twelve-year-old boy case was the *Mariona* case, in which the tire was not the same as the subject tire and was not manufactured in 1992, and that the *Walsh* case was apparently a Georgia case involving a tire not manufactured in Texarkana and not similar to the Tuckier tire.[2] However, the *Swank* case was first mentioned by Cooper in its direct examination of Nonnamaker, so Cooper contradicts itself by calling the case fiction. Cooper's basic argument is that if Cooper did in fact open the door to these cases when attacking the credibility of Nonnamaker, then the Tuckiers went beyond the scope of this door-opening by asking questions that implied Cooper's guilt in other prior cases. Cooper also asserts that regardless of the intent of this questioning, these questions are still subject to M.R.E. 403, the rule which allows the trial court to balance the undue prejudice versus probative value of the admitted evidence.

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[2] Cooper also attached the affidavit of its corporate counsel, Scott Pinzone, attesting to the above to its Alternative Motion for Judgment Notwithstanding the Verdict or For a New Trial or To Alter or Amend the Judgment. This motion was denied by the trial court.

¶ 29. This line of questioning does not constitute reversible error. In *Fleming v. State,* 604 So.2d 280, 291 (Miss. 1992), we have "[C]learly held, however, that once the defense opens the door to otherwise improper testimony, the prosecution is permitted to enter and develop the matter in greater detail." When the defense presents evidence helpful to its case, the adverse side is presented with an opportunity to rebut the evidence and the defendant's theory. By undertaking such an effort, the defense has sufficiently opened the door to evidence that might otherwise have been inadmissible due to relevance and the lack of probative value. *Eakes v. State,* 665 So.2d 852, 868 (Miss. 1995).

¶ 30. In *Florence v. State,* 755 So.2d 1065, 1070 (Miss. 2000), the defendant was charged with sexual battery and aggravated assault and filed a motion in limine to exclude several magazines and videotapes, which the State intended to introduce as being illustrative of homosexual tendencies. We found that Florence had opened the door to this evidence during his opening statement and also during testimony which put the issue of his homosexuality in question. Although Florence argued that the evidence was inadmissible because they were not a part of the res gestae of the crime, we held that the trial court did not err by allowing the magazines and tapes into evidence.

¶ 31. Cooper opened the door to this testimony when it attacked the credibility of the Tuckiers' expert on cross-examination. In addition, the judge gave a cautionary instruction to the jury to disregard all evidence of prior cases in which Cooper was involved. Instruction C 12 stated that, "you cannot and must not consider this evidence of other alleged claims as substantive evidence on the issue of whether Cooper is responsible for the accident

involved in the case before you today." We presume that the jurors follow the instructions as given to them by the trial judge, as upon their oaths, they are required to do so. *Fielder v. Magnolia Beverage Co.*, 757 So.2d 925, 937 (Miss. 1999).

¶ 32. In light of the fact that Cooper is also challenging the denial of its directed verdict, and in finding that the evidence presented was sufficient to uphold the jury verdict, the Tuckiers' re-direct examination of its witness does not constitute reversible error, and this issue is without merit.

C.) Plaintiffs improperly criticized Cooper Tire's discovery objections.

¶ 33. The heart of this sub-issue is that the Tuckiers made reference to a quality assurance manual ("manual"), that had been entered into evidence with several pages that were blank. The Tuckiers allege nearly 90% of the pages were blank, meaning that the information on those pages had either been deleted or "whited-out." Cooper asserts that these pages contained confidential product information and that pursuant to M.R.C.P. 26(d), it was allowed to protect this confidential information. Cooper further asserts that the Tuckiers should not have been allowed to make reference to the blank pages in this manual because they failed to object to the form of the manual or file a motion to compel this information during the discovery process.

¶ 34. However, this manual was offered into evidence by the Tuckiers without any objection from Cooper, during the Tuckiers' cross-examination of Cooper employee Larry Dowd ("Dowd"). Dowd identified the manual and stated on

cross-examination that the manual had, "lots of blank pages in here so it's different. I mean it's difficult to tell if this is the manual I use or not." Dowd further stated, "from the pieces that are here, yes, it looks like pieces of mine." The Tuckiers had every right to question witnesses about this item of evidence.

¶ 35. The manual was admitted into evidence, and the Tuckiers should be allowed to question witnesses because the manual was relevant evidence. As the Tuckiers point out, the quality of the Cooper tire was at issue and one of the purposes for introducing the manual was to show the jury the quality requirements as set forth by Cooper, so that those requirements could be compared to the subject tire. The trial court did not err by allowing the Tuckiers to refer to the blank pages in this manual.

¶ 36. The manual was relevant evidence pursuant to M.R.E. 401, 402, & 403. M.R.E. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The quality of Cooper's tire was of "consequence to the determination of the action." The standard of review for denial of a motion for mistrial is whether the trial court abused its discretion. The trial court did not abuse its discretion by allowing the Tuckiers to refer to the blank pages in this manual.

D.) Plaintiffs presented an expert opinion that was outside the record.

¶ 37. Cooper further asserts reversible error occurred when the Tuckiers made reference to an x-ray report that examined the remaining three tires on Laura's Bronco.

This report was prepared by H.B. Baumgardner, an expert retained by the Tuckiers but not called as a witness. The trial court granted Cooper's pre-trial motion to exclude this evidence. Cooper questioned the Tuckiers' expert, Nonnamaker, on cross-examination, about his examination of these other three tires, and the Tuckiers questioned Nonnamaker in their re-direct about the x-rays of the tires that had been made.

¶ 38. Cooper cross-examined Nonnamaker whether he ever had the other three tires in his possession to inspect and whether he ever looked at the other tires. Nonnamaker answered negatively to both of these questions. Nonnamaker testified on re-direct, over Cooper's objections, that the x-rays had shown that two of the three remaining tires on Laura's Bronco had belted separations, that could have come to fruition and resulted in another one of Laura's tires separating within the next two weeks of when the accident occurred.

¶ 39. Cooper's objections to the mention of these x-rays was overruled by the trial court, and this was not an abuse of its discretion. Cooper's cross-examination was clearly aimed at destroying the credibility of the Tuckiers' expert witness, by showing that the other three tires had not been personally inspected by him. However, Nonnamaker testified that he had examined the x-rays of the remaining three tires and that two of them showed belted separations within the tire. This is relevant evidence for the jury to consider, and it was appropriate re-direct examination by the Tuckiers. The credibility of its witness had been lessened by Cooper, and the Tuckiers attempted to rehabilitate their witness by showing that he had in fact examined the other three tires through the use of x-rays, even though he had not physically seen the tires. The

admission of the x-ray evidence was relevant and despite the pre-trial motions, the trial court did not abuse its discretion by allowing it. The trial court is affirmed.

III. WHETHER THE COMPENSATORY DAMAGES AWARD WAS PROPER.

¶ 40. The Tuckiers were awarded $485,000.00 in compensatory damages, $329,000.00 of which was apportioned to Cooper. In a similar case, *General Motors Corp. v. Jackson,* 636 So. 2d 310, 311 (Miss. 1992), we upheld a compensatory damage award of $7.15 million.

¶ 41. In *Jackson,* there was also a battle of the experts between the parties, with one expert asserting that the accident was caused by a defective rear axle and the other testifying that the impact of the crash caused the axle to break. Based upon the testimony of Oats, Angell, and the Tuckiers' expert witness, Nonnamaker, we find that the award of compensatory damages is proper, and the trial court is affirmed.

IV. WHETHER THE PUNITIVE DAMAGES AWARD WAS PROPER.

¶ 42. Miss. Code Ann. § 11-1-65 (Supp.2001), the punitive damages statute, sets forth factors to be considered. These factors are: 1) whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; 2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; 3) the financial condition and net worth of the defendant; and 4) in

mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct. The trial court gave a jury instruction tailored to these factors.

¶ 43. Mississippi's punitive damages statute, § 11-1-65(1)(a), also states:

> Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

¶ 44. The Tuckiers met this burden of proof through the testimony of Oats and Angell who stated that in the course of their many years of employment with Cooper, they had personal knowledge that bad stock had been used in the manufacture of tires. Cooper thoroughly cross-examined Oats and Angell about the status of their employment when the tire was made in 1992 and about their complaints and grievances with the company over many years of employment. Despite this testimony and questioning, the jury found the Tuckiers' witnesses and testimony to be more persuasive and more credible.

¶ 45. The Tuckiers' witnesses provided the knowledge requirement of the punitive damages statute. If Cooper knew that it was using bad stock to manufacture a product that would be distributed into the stream of commerce and that the general public relied on that product as a safety product, then Cooper would be liable for punitive damages. Cooper admitted during oral arguments before this Court that if it knew bad stock was being used and that this bad

stock could cause a separation, then this would be a safety factor. The testimony provided by the Tuckiers' witnesses and the verdict of the jury giving weight to this testimony provided the necessary requirement of knowledge that allowed this issue to be considered by the jury.

¶ 46. In this case, the Tuckiers presented three witnesses who testified that Cooper used bad stock in manufacturing its tires. The Tuckiers proved at least "willful, wanton or reckless disregard" for the safety of others through this testimony of witnesses that the jury found to be credible. Therefore, punitive damages should have been considered by the jury in this case. The Tuckiers also showed the reprehensible behavior of Cooper when they showed that Cooper knowingly used bad stock in the manufacture of its tires.

¶ 47. Cooper relies heavily on the assertion that only this one tire, the subject tire, was found to be defective out of the 66,000 tires produced by Cooper that year. However, that ratio is not one of the criteria for determining whether punitive damages should have been allowed in this matter. What is important is the reprehensibility of Cooper's conduct. When this one defective tire results in a person's death, there is sufficient evidence to establish this requirement.

¶ 48. The ratio between the punitive damages award and the actual harm to the plaintiff, was also supported by sufficient evidence. The jury returned a verdict awarding total compensatory damages to the Tuckiers for $485,000.00, $329,000.00 of which was apportioned to Cooper. Following the subsequent punitive damages stage of the trial, the jury awarded the Tuckiers $3 million in punitive damages. Although, this punitive damages award

was nearly ten times the compensatory damages award against Cooper, this ratio is acceptable under the Miss. Code Ann. § 11-1-65(1)(f) factors, which include the financial condition and net worth of the defendant. On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court. *Valley Forge Ins. Co./CNA Ins. Co. v. Strickland,* 620 So.2d 535, 541 (Miss. 1993) (citing *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172, 1190 (Miss. 1990)); *Banker's Life & Cas. Co. v. Crenshaw,* 483 So.2d 254, 278 (Miss. 1985). A simple mathematical formula cannot be used to determine whether this punitive damage award is excessive or constitutional.

¶ 49. Punitive damages have been upheld by this Court in cases where the conduct by the defendant was far less egregious than in this matter. In a case concerning a defendant insurance company's subrogation claims, a punitive damages award of 1.5% of the defendant's net worth was upheld. *Valley Forge,* 620 So. 2d at 541 (citing *Andrew Jackson,* 566 So. 2d at 1191 (affirming a punitive damages award of 5.25% of the defendant's net worth)).

¶ 50. In *BMW of North Am., Inc. v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996), the Court held that where Gore had only suffered economic damages and his punitive damages award was 500 times the amount of his actual damages, his award was clearly outside the acceptable range of awards. Comparing this situation with another matter, we have upheld that punitive damage awards equaling 150 times and 43 times the amount of actual damages. *Paracelsus Health Care Corp. v. Willard,* 754 So. 2d 437, 445 (Miss. 1999).

¶ 51. The parties' attorneys in this matter had stipulated that Cooper's net worth was $947,000,505.00. An award of $3 million dollars represents less than one percent of Cooper's net worth. The Tuckiers' punitive damage award was not excessive and is therefore affirmed.

CONCLUSION

¶ 52. For the above reasons we affirm the jury and trial court's judgment.

¶ 53. **AFFIRMED.**

WALLER, DIAZ, EASLEY AND GRAVES, JJ., CONCUR. SMITH, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PITTMAN, C.J., AND COBB, J. CARLSON, NOT PARTICIPATING.

SMITH, PRESIDING JUSTICE, DISSENTING:

¶ 54. In my view, the majority errs in holding that the Tuckiers made a prima facie case under the Mississippi Products Liability Act (MPLA) by asserting that Cooper used "bad stock" in the manufacture of the subject tire. The repeated reference by the majority and by the Tuckiers to the materials used by Cooper in the construction of its tires as "bad stock" inappropriately weights the issue before us. Repeated use of the words "bad stock" amounts to nothing short of buzz words and has nothing to do with the real issue here.

¶ 55. The primary issue before this Court is whether the Tuckiers met their burden of showing that Cooper's tires were defective when manufactured and/or that Cooper was negligent in the manufacturing of its tires. If the Tuckiers failed to meet their burden on either the defect claim or

the negligence claim, directed verdict was proper as to that claim. In my view, the Tuckiers failed to make a prima facie case as to either the defect claim or the negligence claim. Therefore, I believe that the trial court's denial of Cooper's motion for directed verdict was improper. Accordingly, I respectfully dissent.

I. MANUFACTURING DEFECT

¶ 56. Prior to trial, the Tuckiers narrowed their product defect claims against Cooper to one theory of defect – mismanufacture. They claimed that the use of old rubber stock in making the tire constituted a manufacturing defect as defined by Miss. Code Ann. § 11-1-63(a)(i)(1) (Supp. 2001). Section 11-1-63 provides, in pertinent part:

> In any action for damages caused by a product except for commercial damage to the product itself:
>
> > (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
> >
> > > (i)(1) The product was defective because it deviated in a material way from the **manufacturer's specifications** or from otherwise identical units manufactured to the same **manufacturing specifications**. . . .

(emphasis added).

¶ 57. The requisite specifications serve as the standard against which the allegedly mismanufactured product is to be measured. By establishing such, the MPLA relieves a

plaintiff of the burden of proving that the defect occurred through the defendant's negligence or other fault. Cooper's specifications were provided to the Tuckiers during discovery, but the Tuckiers failed to offer them into evidence or present testimony as to how the subject tire deviated from the specifications.

¶ 58. The majority accepts the Tuckiers' assertion that, even without the manufacturer's specifications, the "good stock/bad stock" distinction is an adequate standard against which a deviation may be established. In my view, "good stock" is not an adequate standard against which the deviation of a product can be measured so as to relieve the plaintiff of the burden of proving that the defect occurred the manufacturer's negligence or other fault.

¶ 59. The majority holds that the Tuckiers met their burden of proof through the testimony of their expert, Max Nonnamaker. Nonnamaker testified that the rubber between the two steel belts of the tire failed to form a proper chemical bond because Cooper used old rubber stock in building the tire. Nonnamaker's *entire* testimony regarding the old rubber stock is as follows:

> Q. . . . . Based on your examination of this tire, can you tell us what the most probable reasons for this tire peeling and ripping apart are?
>
> A. Yes.
>
> Q. What are they?
>
> A. The stock that was used to build the tire in the steel belts was probably dry or set up. In other words, the rubber had started to kind of cure, and it had kind of a covering over the top of it, and that kept it from bonding together chemically. Now, it was bonded together physically

because you use a lot of pressure and heat and time for curing the tire, so it was bonded together mechanically but not chemically, which is what you need in order to get a tire that will not fail.

And for that reason this tire ran for quite some distance, but it finally started coming apart at the interface of the rubber that encases the steel belts. And that probably is due to the fact that even though you're supposed to use the steel belts as they're prepared as an in and out basis so that they don't set for a long period of time, what can happen is for some reason, there was too long a period of time and they neglected to handle the drier set of stock.

What you do on drier set of stock you can then put benzene, or used to be you could benzene on it. They no longer use benzene, but they use a solution that improves the tackiness of the rubber so that it breaks down the film that has developed from the drier set of stock so that it will chemically bond together. There's an interlinking of the molecules in the rubber, a crosslinking so that you get the proper cure.

And you heard just from the previous witness that for 10- or 12-day period at the end of the year they're closed down, so that stock has started getting dry, and this wasn't built until the fourth week. So not every tire is bad or not every tire fails, but there's a weakness that was built into the tire that is consistent with the fourth week of 1992.

¶ 60. Nonnamaker then went on to testify that, in his opinion, the accident was not caused by under-inflation, road hazards, or tire aging. No testimony was ever offered that the length of time which Cooper retained stock before

using it fell short of Cooper's specifications, or any other standards, for that matter. No testimony was offered as to how long the materials should remain unused. In fact, no testimony was offered by the Tuckiers demonstrating the length of time which the materials actually did remain unused.

¶ 61. In short, Nonnamaker testified that the tire was not constructed in the way it should have been constructed. However, without evidence of standards establishing the way in which the tire should have been constructed, Nonnamaker's theory fails to demonstrate the existence of a defect under the § 11-1-63(a)(i)(1). Stated otherwise, a product is not "defective" under § 11-1-63(a)(i)(1) unless it is shown to be out of compliance with the manufacturer's specifications. *See Leverette v. Louisville Ladder Co.,* 183 F.3d 339, 341 (5th Cir. 1999) (holding that expert's testimony that ladder had manufacturing defect was properly excluded in products liability action under Mississippi law where expert failed to assess whether ladder met manufacturer's specifications).

¶ 62. Larry Dowd, a product assurance manager for Cooper at the Texarkana plant, testified that Cooper has a 30-day limit on the amount of time materials are allowed to sit before they are utilized in the manufacturing process. Dowd testified that the 30 days was never exceeded because the plant maintains a 24-hour inventory – that is, all materials are used with twenty-four hours. The fact that the materials sat in the plant for 12 days during the holiday shutdown does not demonstrate that they sat for longer than the 30-day rule adhered to by Cooper. Again, the subject tire was manufactured the last week in January 1992.

¶ 63. The two Cooper employees who testified that Cooper used old stock, Jimmy Oats and Richard Angell, did not testify that the materials were unused for more than 30 days. They merely testified that Cooper was using "old stock." Again, there is no testimony identifying what constitutes "old stock" or whether Cooper used stock which failed to meet this undefined standard. In my view, not only was no deviation proven, but the Tuckiers failed to show the standard against which a deviation is measured.

¶ 64. "Good stock/bad stock" and "fresh stock/old stock" are not sufficient standards under the MPLA. Proof of a standard or specification, if any, exists in the uncontradicted testimony that Cooper required its stock to be utilized within 30 days, and, again, there was no proof that the subject tire was manufactured from materials older than 30 days.

II. NEGLIGENCE

¶ 65. The Tuckiers also failed even to make a prima facie case for to support its negligence claim. Even assuming that the standard of care for a negligence claim may be shown by more than the manufacturer's own specifications, which, as discussed previously, were not admitted at trial, the Tuckiers failed to put forth any evidence that Cooper's stated practice of scrapping stock more than 30 days old fell short of any industry-wide standard. There was simply no testimony at trial establishing a standard by which to measure Cooper's conduct. Simply arguing that stock was "too old" or "bad" is, in my view, insufficient to sustain the Tuckiers negligence claim.

III.

¶ 66. The trial court erred in denying Cooper's request for directed verdict. The Tuckiers failed to make a prima facie case on either the defect claim or the negligence claim. The trial court's judgment should be reversed and rendered for Cooper Tire.

¶ 67. For these reasons, I respectfully dissent.

PITTMAN, C.J., AND COBB, J., JOIN THIS OPINION.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF PANOLA COUNTY, MISSISSIPPI

TRUDYS TUCKIER, INDIVIDUALLY, ET AL.

PLAINTIFFS

vs. Cause No. CV 97-0064-C(P1)

COOPER TIRE AND RUBBER COMPANY

DEFENDANT

JUDGMENT

This action came on to be heard on November 1, 1999, before the Court and jury duly empaneled consisting of Julius Gipson and eleven other good and lawful citizens of the First Judicial District of Panola County, Mississippi, and the jury having found on the issues in favor of the Plaintiffs and against the Defendant, Cooper Tire and Rubber Company, returned its verdict into open Court on November 4, 1999, assessing total compensatory damages in favor of the Plaintiffs, Trudys Tuckier, et al., in the amount of ($485,000.00) four hundred eighty-five thousand dollars. And the jury assigned a percentage of fault as follows: Lawrence Tuckier – 0%; Laura Dawn Tuckier – 2%; Ford Motor Company, Inc. – 30%; Cooper Tire & Rubber Company – 68%; Johnny Ray Works – 0%; and, Dillard Lowery d/b/a Auto Specialists – 0%.

Thereupon, the Court promptly commenced an evidentiary hearing before the same jury to determine whether punitive damages may be considered, and at the conclusion of said evidentiary hearing, the Court determined, as a matter of law, that the issue of punitive damages should be submitted to the trier of fact to determine whether to award punitive damages, and if so, in

what amount, and jury finding that punitive damages should be awarded returned a verdict into open Court on November 5, 1999, assessing punitive damages against the Defendant, Cooper Tire and Rubber Company, in the amount of ($3,000,000.00) three million dollars.

Pursuant to the provisions of §11-1-65(f), the Court has, after due consideration, ascertained that the award of punitive damages herein is reasonable in its amount and rationally related to the purpose to punish the wrongdoing of the Defendant herein and to deter its repetition by the Cooper Tire and Rubber Company and others similarly situated. The Court has considered each of the factors enumerated in §11-1-65(f)(ii) and finds that the amount of punitive award is appropriate, and not excessive.

It is, therefore, ordered and adjudged, that the Plaintiffs, Trudys Tuckier, et al., have and recover of the Defendant, Cooper Tire and Rubber Company, the sum of ($329,800.00) three hundred twenty-nine thousand eight hundred dollars as compensatory damages; with interest as provided by law.

It is further ordered and adjudged that the Plaintiffs, Trudys Tuckier, et al., have and recover of the Defendant, Cooper Tire and Rubber Company, the sum of ($3,000,000.00) three million dollars as punitive damages, with interest as provided by law.

SO ORDERED AND ADJUDGED this the 17th day of November, 1999.

/s/ George C. Carlson, Jr.
George C. Carlson, Jr.
Circuit Court Judge.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
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April 4, 2002

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 4th day of April, 2002.

Supreme Court Case # 2000-CA-00404-SCT
Trial Court Case # CV-97-64-CP1

Cooper Tire and Rubber Company v. Trudys Tuckier, Individually, and as Administratrix of the Estate of Laura Dawn Tuckier, Deceased, and as Representative of the Wrongful Death Beneficiaries

Appellant's motion for rehearing is denied. Smith, P.J., Waller and Cobb, JJ., would grant. Carlson, J., not participating.

*NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS*

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

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§ 11-1-65. Punitive damages.

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness

of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f) (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(g) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(2) The provisions of Section 11-1-65 shall not apply to:

(a) Contracts;

(b) Libel and slander; or

(c) Causes of action for persons and property arising out of asbestos.

SOURCES: Laws, 1993, ch. 302, § 2, eff from and after July 1, 1993.

§ 11-3-23. Judgment for damages against appellant on affirmance of judgment or on failure to prosecute appeal; computation.

In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows:

If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value of the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any condemnee appealing

from a special court of eminent domain in any circumstances.

SOURCES: Codes, Hutchinson's 1848, ch. 63, class 4, art. 2 (152); 1857, ch. 63, art. 12; 1871, § 414; 1880, § 1442; 1892, § 4360; 1906, § 4926; Hemingway's 1917, § 3202; 1930, § 3387; 1942, § 1971; Laws, 1977, ch. 446; 1978, ch. 335, § 3; 1980, ch. 533, § 1, eff from and after July 1, 1980.

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§ 11-53-55. Cases not expressly embraced by statute or Rule.

If a case shall occur in any court not embraced expressly by statute, Mississippi Rules of Civil Procedure or Mississippi Supreme Court Rules, the court may make such order for the payment of costs by any of the parties as, in its discretion, may be proper.

SOURCES: Codes, 1880, § 2386; 1892, § 889; Laws, 1906, § 966; Hemingway's 1917, § 675; Laws, 1930, § 682; Laws, 1942, § 1593; Laws, 1993, ch. 452, § 2, eff from and after passage (approved March 22, 1993).

Litigation Accountability Act of 1988

§ 11-55-1. Title.

This chapter may be cited as the "Litigation Accountability Act of 1988."

SOURCES: Laws, 1988, ch. 495, ch. 495, § 1, eff from and after July 1, 1988.

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§ 11-55-3. Definitions.

The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) "Without substantial justification," when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court.

(b) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company or any other entity, including any governmental entity or unincorporated association of persons.

(c) "Action" means a civil action that contains one or more claims for relief, defense or an appeal of such civil action. For the purposes of this chapter only, an "action" also means any separate count, claim, defense or request for relief contained in any such civil action.

SOURCES: Laws, 1988, ch. 495, § 2, eff from and after July 1, 1988.

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§ 11-55-5. Assessment of attorney fees and costs against attorney and party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(2) No attorney's fees or costs shall be asserted if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.

(4) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney

shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that such party's action, claim or defense or any part of it was without substantial justification.

SOURCES: Laws, 1988, ch. 495, § 3, eff from and after July 1, 1988.

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§ 11-55-7. Award of costs and attorney fees; amount of award; factors to consider.

In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorney's fees and costs and the amount to be assessed.

(a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;

(b) The extent of any effort made to after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;

(c) The availability of facts to assist in determining the validity of an action, claim or defense;

(d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

(e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;

(f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

(g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

(h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court.

(i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

(j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

(k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

SOURCES: Laws, 1988, ch. 495, § 4, eff from and after July 1, 1988.

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§ 11-55-9. Limitations of chapter.

Nothing in this chapter shall be construed to prevent an attorney and his client from negotiating in private the actual fee which the client is to pay the client's attorney. Nothing in this chapter is intended to limit the authority of the court to approve written stipulations filed with the court or oral stipulations in open court agreeing to no award of attorney's fees or costs, or an award of attorney's fees or costs in a manner different than that provided in this chapter.

SOURCES: Laws, 1988, ch. 495, § 5, eff from and after July 1, 1988.

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§ 11-55-11. Application of chapter.

This chapter shall apply in all cases unless attorney's fees are otherwise specifically provided by statute or court rule, in which case the provision allowing the greater award shall prevail.

SOURCES: Laws, 1988, ch. 495, § 6, eff from and after July 1, 1988.

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§ 11-55-13. Severability.

If any section, paragraph, sentence, phrase or any part of this chapter shall be held invalid or unconstitutional, such holding shall not affect any other section, paragraph, sentence, clause, phrase or part of this chapter which is not in and of itself invalid or unconstitutional. Moreover, if the application of this chapter, or of any portion of it, to any person or circumstance is held invalid, the invalidity shall not affect the application of this chapter to other persons or circumstances which can be given effect without the invalid provision or application.

SOURCES: Laws, 1988, ch. 495, § 7, eff from and after July 1, 1988.

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§ 11-55-15. Actions to which chapter applies.

This chapter shall apply to any suit or claim or defense or appeal filed or perfected subsequent to the effective date of this chapter. It shall also apply to any suit or claim or defense or appeal which has been filed or perfected prior to the effective date of this act and which is not dismissed within one hundred eighty (180) days after the effective date of this chapter [July 1, 1988].

SOURCES: Laws, 1988, ch. 495, § 8, eff from and after July 1, 1988.

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§ 75-17-7. Interest on judgments and decrees.

All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

SOURCES: Codes, Hutchinson's 1818, ch. 47, art. 2 (3), ch. 54, art. 2 (38); 1857, ch. 50, arts. 1, 3, ch. 62, art. 100; 1871, §§ 1269, 2279, 2281; 1880, §§ 1141, 1143, 1958; 1892, § 2350; Laws, 1906, § 2680; Hemingway's 1917, § 2078; Laws, 1930, § 1949; Laws, 1942, § 39; Laws, 1975, ch. 336, § 1; Laws, 1989, ch. 311, § 5, eff from and after July 1, 1989.

Miss. R. Civ. Proc. Rule 11. Signing of Pleadings and Motions

(a) Signature Required. Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in its individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading or

motion and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorney's fees.

[Amended effective March 13, 1991.]

Advisory Committee Historical Note

Effective March 13, 1991, Rule 11(b) was amended to provide for sanctions against a party, his attorney or both. 574-576 So.2d XXI (West Miss.Cas.1991).

Miss. R. App. Proc. Rule 36. Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Supreme Court or the Court of Appeals. If a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. If a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court which decided the case.

(b) Costs For and Against the State of Mississippi. Costs may be awarded for or against the State of Mississippi or any of its agencies, or officers, or political subdivisions unless otherwise provided by law.

(c) Costs on Appeal Taxable in Court Below. Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) Rehearing and Retaxing Costs. If the allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, a party seeking relief may file a motion for rehearing under Rule 40. All motions to retax costs in the Supreme Court or the Court of Appeals must be filed within 14 days after issuance of the mandate or any addition to the mandate. A party who is not aggrieved by the opinion or mandate but who seeks relief as to

any other matter involving costs shall seek relief in the trial court.

[Adopted to govern matters filed on or after January 1, 1995; amended June 21, 1996.]

Miss. R. App. Proc. Rule 38. Damages for Frivolous Appeal

In a civil case to which Miss. Code Ann. § 11-3-23 (1991) does not apply, if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.

[Adopted to govern matters filed on or after January 1, 1995.]

Advisory Committee Historical Note

Effective January 1, 1995, Miss. R. App. P. 38 replaced Miss. Sup. Ct. R. 38, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII (West Miss. Cases 1994).

IN THE MISSISSIPPI COURT OF APPEALS

CASE NO. 2000-CA-00404

COOPER TIRE & RUBBER COMPANY	**APPELLANT**
VS.	
TRUDYS TUCKIER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LAURA DAWN TUCKIER, DECEASED, AND AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES	**APPELLEES**

On Appeal from the Circuit Court of the First Judicial District of Panola County, Mississippi

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ORIGINAL BRIEF OF APPELLANT COOPER TIRE & RUBBER COMPANY

(Filed Sept. 27, 2000)

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RUBBER COMPANY

* * *

III. ***The award of punitive damages should be reversed because it is contrary to law.***

Even assuming the record supports a finding of Cooper's liability for (presumably) constructing a single flawed tire, that mistake does not support the jury's award of $3,000,000 in punitive damages. The court erred in permitting the issue of punitive damages to proceed to the jury on evidence which showed that Cooper's only intentional conduct was to try its very best to prevent the production and distribution of any tire whose construction presented a danger to the public. The fact that this was the only known claim about more that 66,000 tires demonstrates the success of Cooper's quality control program. The verdict awarding punitive damages has no basis in admissible evidence: it could only have been based on improper, prejudicial proof and argument. Therefore, the court erred in refusing Cooper's motion for directed verdict and its request for a peremptory instruction on punitive damages. Even if the compensatory damages are affirmed on appeal, the entire punitive damages award must be set aside.

A. The court erred in permitting the issue of punitive damages to go to the jury.

The standard for imposing punitive damages in Mississippi is prescribed by statute: punitive damages may not be awarded unless the plaintiff proves by clear and convincing evidence that the defendant acted with "gross negligence which evidences a willful, wanton or reckless disregard for the safety of others." Miss. Code. Ann. § 11-1-65(1)(a). It has been acknowledged many times that Miss. Code Ann. § 11-1-65 "merely codifies long-standing Mississippi case law which holds that punitive damages are to be awarded only in extreme cases in which the defendant acted intentionally, or with a gross disregard for the rights of others." *Spann v. Robinson Property Group*, 970 F.Supp. 564 (N.D. Miss. 1997) (*citing Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 (Miss. 1983); *Fowler Butane Gas Co. v. Varner*, 141 So.2d 226, 233 (Miss. 1962)). Even gross negligence will not permit punitive damages unless the fault is a "willful and intentional wrong." *Eastover Bank for Savings v. Hall*, 587 So.2d 266, 272 (Miss. 1991). Punitive damages are not appropriate in cases such as this, where the claimant shows, if any fault at all, mere simple negligence. *Boling v. A-1 Detective & Patrol Service, Inc.*, 659 So.2d 586, 588-89 (Miss. 1995). A plaintiff does not have a claim of right to punitive damages because the jury or trial judge always may withhold them. *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So. 2d 1062 (Miss. 1996).

Punitive damages *are not a matter of right* in every case in which liability is found. Mississippi Code Ann. § 11-1-65(1)(d) requires that "[t]he court shall determine

whether the issue of punitive damages may be submitted to the trier of fact. . . . " This provision places the trial court in a "gatekeeping" role because "[t]he jury should be allowed to consider the issue of punitive damages [only] if the trial judge determined under the totality of the circumstances and in light of defendant's aggregate conduct, that a reasonable, hypothetical juror would have identified either malice or gross disregard to the rights of others." *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 442 (Miss. 1999), *cert. denied*, 120 S.Ct. 2219 (2000). The court failed to perform this critical gatekeeping role when Cooper moved for a directed verdict on the issue of punitive damages [Tr. 1749] because plaintiffs had presented absolutely no evidence of the requisite malice or gross disregard for anyone's rights or safety. All of the competent, admissible evidence during both phases of the trial – there was no substantial evidence during the punitive phase – showed that the worst conduct of which Cooper could have been guilty was an unintended glitch[19] in the tire building process. The court committed reversible error in permitting the jury, inflamed by prejudicial arguments, to consider such evidence as the basis for awarding millions of dollars in punitive damages.

As recounted in the prior sections of this brief, the evidence shows that Cooper produced more than 66,000 tires at its Texarkana plant using the same specifications as for the allegedly defective subject tire. [Tr. 1359-60] This lawsuit is the only claim that Cooper has

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[19] Had the glitch been an "intended" one, then plaintiffs' claim would have alleged a design defect, not a deviation from the specifications for the tire's construction.

received alleging a flaw in any one of those 66,000 tires.[20] [Tr. 1360] The only mention of negligent practices was the testimony of two former employees, admitted over Cooper's objection, which should have been excluded because they had no personal knowledge about Cooper's tire building processes during the time the subject tire was manufactured and because plaintiffs' expert did not base his opinion on their testimony. These same former employees testified that they and other Cooper employees had been reprimanded for poor workmanship. [Tr. 851-54, 856-61, 950-53] And, like plaintiffs' tire expert Mr. Nonnamaker, both these men equip their own vehicles with Cooper tires. [Tr. 846-47, 946, 1014] Mr. Nonnamaker testified that the construction of the subject tire met all applicable federal standards [Tr. 1036-37] and that Cooper could not be guilty of failing to test the tire because the "failure mode" did not develop until later [Tr. 1039]. Unlike Mr. Oats and Mr. Angell, Cooper's present employees who testified had personal knowledge of the practices in the tire building section of the Texarkana plant in 1992. They testified that any stock that the engineers or chemists believed was out-dated was always tagged and not used. [Tr. 1454-56, 1512] They testified that the mission of all 1600 Cooper employees is to produce a quality product, free of defects. [Tr. 1451] Cooper employees at all levels are encouraged to seek out and eradicate problems and

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[20] During the punitive phase, as during the compensatory phase, plaintiffs' counsel played to the hilt the unproved charge that all of the tires on Ms. Tuckier's Bronco were defective. Indeed, among the final words the jury heard from counsel in this trial was plaintiffs' counsel's rebuttal closing that she was killed in a car with four defective tires. [Tr. 1803] This charge is not supported by *any evidence*.

potential problems. If a tire builder has a complaint about the rubber stock that he is using, he may take up the issue with his supervisor and then with higher management. [Tr. 1454, 1456, 1511, 1513] Employees are not encouraged to use bad materials, nor are they paid for turning out flawed tires. [Tr. 1457] Cooper's Director of Technical Relations, who was plaintiffs' only witness during the punitive damages phase of trial, categorically refuted every question that attempted to incriminate Cooper and its tire building process. [Tr. 1728-30]

As a matter of law, this record contains nothing for a jury to consider with regard to punitive damages. There is no evidence of malice or reckless disregard for the jury to weigh because there is no such evidence. A directed verdict, therefore, was the only permissible ruling the court could have made during the punitive phase of trial. Consequently, the denial of Cooper's motion for directed verdict and the award of punitive damages should be reversed.

B. The award of punitive damages is not supported by the evidence.

In order to award punitive damages, the trier of fact must find *by clear and convincing evidence* that the defendant acted with the requisite "actual malice [or] gross negligence which evidences a willful, wanton or reckless disregard for the safety of others." Miss. Code Ann. § 11-1-65(1)(a). Clear and convincing evidence is a familiar term because that has been the burden of proof required to prove fraud for at least 90 years. *Carter v. Eastman Gardner & Co.*, 48 So. 615 (Miss. 1909). The

cases reversing fraud judgments for failure to meet that burden are legion. In *Aponaug Mfg. Co. v. Collins*, 42 So.2d 431 (Miss. 1949), the Mississippi Supreme Court held that clear and convincing evidence means more than merely an "overwhelming weight" of the evidence.

> [W]hether evidence of fraud charged in a civil case is clear and convincing is ordinarily for the jury, but where it manifestly falls below that standard and is not of such a real and substantial nature that impartial men of sound judgment could reasonably believe it, the judge should direct a verdict for the opposing party. . . . [C]harges of fraud must be supported by clear proof which is more convincing than a mere preponderance of the evidence.

Id. at 437 [citations omitted]. Obviously, this same burden of proof must be met to sustain a punitive damages award, and there is every reason to apply the same strict standard of review to punitive damages awards that long have been applied in fraud cases.

The absolute dearth of evidence that Cooper's conduct fulfilled the requirements set forth in § 11-1-65 forecloses any finding of liability for punitive damages, especially a finding that must be made on a showing of clear and convincing evidence. Therefore, for the same reasons that the jury should not have been permitted even to consider whether punitive damages were appropriate, the award of those damages was error and must be reversed.

C. The award of punitive damages is based on inadmissible evidence and improper argument.

Because there was no competent, admissible evidence to support the jury's finding that punitive damages were appropriate in this case, the $3,000,000 award must have been the product of prejudice created by evidence and argument that the jury should not have been permitted to hear. The trial court's failure to control the proceedings so that only relevant, admissible evidence was introduced resulted in an award based on factors other than Cooper's conduct – which should have been the only matter the jury considered in determining whether to award punitive damages under Miss. Code Ann. § 11-1-65(1)(a).

Neither innuendo, rumor, hearsay, nor sympathy may support the jury's decision to award punitive damages, yet plaintiffs played upon and emphasized all these considerations – rather than relevant, admissible evidence – in the punitive phase of the trial. In addition to again bringing up the non-existent evidence and improper argument[21] that pervaded trial, plaintiffs' closing argument in the punitive damages phase improperly suggested to the jury that an award of punitive damages would be used for a worthy cause. Over Cooper's objection, plaintiffs' counsel reminded the jury that the Tuckier family had "created a scholarship memorial fund at their church to help underprivileged children go

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[21] Plaintiffs' closing argument again told the jury about the pictures of defective tries in the notebook that Cooper's employees said did not exist [Tr. 1784], and again harped on the "four" defective tires [Tr. 1803].

to school." [Tr. 1786] This comment was entirely improper.

The only purpose of punitive damages is to punish and deter the defendant's conduct, not to "do good" for society in a way unrelated to the defendant's conduct. Miss. Code Ann. § 11-1-65(1)(e). Suggesting the ultimate disposition of an award the jurors might make improperly detracts from the proper focus on the defendant's conduct. In addition, such a suggestion prejudices the defendant by giving the jury an impermissible reason to increase the size of its award. In *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1063 (1994), the court found reversal error in a closing argument, similar to that in this case, which "intimated that part of the [punitive damages] award would compensate victims of similar farm-implement accidents." *Id.* at 506. Similar information conveyed in a jury charge also may require reversing a punitive damages award. For example, in *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 569-71 (Ga. 1996), the trial judge charged the jury that, pursuant to Georgia statute, 75 percent of any punitive damages award would be paid into the state treasury. This erroneous charge required reversal of the jury's award. The Georgia Supreme Court held that "the trial court improperly shifted the jury's focus from the critical question of the defendant's conduct to the inappropriate question of the plaintiff's compensation." *Id.* at 570. Like the improper instruction in *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1023 (Or. 1990), which encouraged the jury to "add additional amounts," plaintiffs' closing argument in this case encouraged the jurors to award a generous amount of punitive damages because the Tuckier family would use the money to fund

education for underprivileged children. No award influenced by such improper argument should be permitted to stand.

IV. *The award of punitive damages violates the Constitutions of Mississippi and the United States.*

The award of punitive damages in this case is not only unsupported by the evidence but also violates Cooper's constitutional rights. Cooper pleaded in its answer [R. 71-74] that the application of Miss. Code Ann. § 11-1-65 in this case would be unconstitutional. Cooper raised this issue again in its post-trial motions. [R. 2865-68] Now that the trial proceedings are complete, the record is fully developed, and the evidence laid out before this Court, the violation of Cooper's constitutional rights is more apparent than ever.

A. The punitive damages award violates due process principles.

In *BMW v. Gore*, 116 S.Ct. 1589, 1597 (1996), the Court set out three factors for determining whether a punitive damages award violates "[e]lementary notions of fairness enshrined in our constitutional jurisprudence." Notably none of the three factors has anything to do with the defendant's wealth, the factor which was the overwhelming focus – indeed, it was the only evidence presented – during the punitive damages case against Cooper. The guideposts are instead: the degree of reprehensibility of the conduct; the disparity between the harm suffered by the plaintiff and the punitive damages award; and the difference between this remedy

and the civil penalties authorized or imposed in comparable cases. Consideration of these factors shows in this case that the award of punitive damages violated Cooper's right to due process.[22]

Consideration of the first factor, "the degree of reprehensibility of the defendant's conduct," quickly shows the arbitrary nature of the award against Cooper. "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high level of culpability that warrants a substantial punitive damages award." *Id.* at 1601. Miss Code. Ann. § 11-1-65 does not provide guidance for the jury in assessing the reprehensibility of the defendant's conduct. An instruction that directs a jury to consider "reprehensibility" without providing a comparative context encourages excessive awards and becomes "a concept without a constraining force." *BMW*, 116 S.Ct. at 1606 (Bryer, J., concurring). The jury in this case was permitted to determine liability for and the amount of punitive damages under imprecise, inconsistent and arbitrary standards which do not give advance notice to a potential defendant of the prohibited conduct or mental state that makes an award of punitive damages possible.

Even crediting the testimony of plaintiffs' incompetent witnesses, Cooper was guilty, at worst, of only simple negligence which, despite its efforts at all stages

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[22] The Mississippi statute, § 11-1-65(1)(f)(ii)(1-4), enumerates factors to be used *by the court* to determine whether the jury's award is excessive. These four factors are similar to the three *BMW* factors, but the record contains no indication that the circuit court paid heed to either the statutory or *BMW* factors.

of production, resulted in a single tire leaving its plant with an internal flaw. The record is devoid of evidence of either intent or deception. This lawsuit is the only claim that Cooper has received alleging a flaw in any one of the 66,000 tires produced to the subject tire's specifications in the Texarkana plant in 1992. [Tr. 1360] Cooper, therefore, had absolutely no notice or awareness of any harm caused by the production and distribution of a dangerous product. This complete absence of awareness of a single tire's defect, even if its existed, vitiates the requirement for imposition of punitive damages that the defendant exhibit a conscious and deliberate disregard of the interests of others. As one commentator acknowledged, "[a] defendant who is unaware of a product's defect can hardly 'consciously' or 'recklessly' disregard any other party's rights." Robert A. Sachs, *"Other Accident" Evidence in Product Liability Actions: Highly probative or an accident waiting to happen?* 49 Okla. Law Rev. 257, 291-92 (1996). As held in *Sodden v. Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983), "Freightliner's knowledge of the defective design of its fuel system . . . was a required element in the appellees' claim for exemplary damages." *Id.* at 508.

No one – product manufacturer or ordinary citizen – would expect that the sanction for mere negligence like that plaintiffs charged against Cooper would be anything more than to pay for the damage, which Cooper was required to do when the jury assessed compensatory damages. Indeed, one would search the case law in vain to find any case where punitive damages were imposed for such conduct, and the Mississippi Supreme Court has held many times that simple negligence cannot

support an award of punitive damages. *Boling v. A-1*, 659 So.2d at 588-89; *Eastover Bank*, 587 So.2d at 272.

"The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW*, 116 S.Ct. at 1601. The focus in considering this factor is the comparison of the compensatory and punitive damages. "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." *Id.* Common law and historic statutory penalties were set no higher than double, triple, or quadruple actual damages. *Id.* These statues and common law standards stretching back more than half a millennium serve as a benchmark for the limits set by due process in punitive damages cases. *Id.* at 1601-02. Thus, in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), the Court found a punitive award of more than four times the amount of compensatory damages "close to the line." A higher ratio might be acceptable but only in limited circumstances – "if, for example, a particularly egregious act has resulted in only a small amount of economic damages," or where "there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *BMW*, 116 S.Ct. at 1602 (*quoting TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2718 (1993)). The punitive damages award in this case, approximately ten times Cooper's share of compensatory damages, violates these rules, particularly given the nature of Cooper's negligent conduct, which was not shown to threaten any other person and

which caused injury only when combined with the fault (as found by the jury) of at least two others.

The third factor is the difference between the remedy awarded in this case and any civil penalties authorized or imposed in comparable cases. Comparing the $3,000,000 punitive damages award in this case with the penalty that might be imposed under consumer protection laws provides a third measure of the gross excessiveness of the jury's award. Indeed, it is difficult to make this comparison because one would search long and hard before finding any civil penalty that would be imposed on a manufacturer who produced a single unit of a mass-produced product having an unintended flaw which was not present in any other of the thousands of units produced. It is undisputed that the tire at issue met all applicable federal regulations. Neither the Department of Transportation or the National Highway Traffic Safety Administration inspects tire-making facilities. It does not appear that either Arkansas or Mississippi has any statute or rule that would impose a fine or other penalty on Cooper under the circumstances of this case. Therefore, the $3,000,000 sanction is substantially greater than the fine or penalty (if any) that might have been imposed on the manufacturer for producing such a flawed tire. Cooper received, in effect, a harsh criminal fine[22] for a single act of simple

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[22] Although the award was clearly punitive in nature, Cooper did not receive the protections afforded criminal defendants by the Fourteenth Amendment to the United States Constitution and Article 3, §§ 14, 22, 26 and 31 of the Constitution of the State of Mississippi. These rights include protection against unreasonable searches and seizures, double jeopardy or impermissible multiple punishments, and compelled self-incrimination, and the right to confront adverse

(Continued on following page)

negligence that probably would not have been subject to any civil penalty. Under the constitutional analysis required by *BMW*, the award of punitive damages must be set aside.

B. The punitive damages award violates the principle that Mississippi may not punish or deter conduct in other states.

An individual's right to due process transcends state law. The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive" punishment on a tortfeasor.[34] *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2718 (1993). While a state may legitimately impose punitive damages to enforce its interests in punishment and deterrence, due process is violated when an award is grossly excessive in relation to the state's interests. No state may impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's conduct in other states. *BMW*, 116 S.Ct. at 1597. "A state does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow v. Virginia*, 95 S. Ct. 2222, 2234 (1975).

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witnesses, to compulsory process for favorable witnesses, and to an unanimous verdict of a twelve person jury, and proof beyond a reasonable doubt on every element of an award of punitive damages. *See International Union, United Mine Workers v. Bagwell*, 114 S.Ct. 2552 (1994) (holding that fine for contempt was criminal in nature, requiring defendant be extended same rights as for criminal conviction).

[34] An excessive punitive damages award also violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article 3 § 28 of the Constitution of the State of Mississippi.

"While each state has ample power to protect its consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *BMW*, 116 S.Ct. at 1604.

Because Miss. Code Ann. § 11-1-65 does not limit the jury's consideration to the defendant's conduct in Mississippi, the statute is flawed. Its application in this case violated Cooper's due process rights because the jury was not informed that the measure of punitive damages should be only the amount reasonably necessary to further Mississippi's legitimate interests in punishment and deterrence. As Cooper argued to no avail in the proceedings below, these considerations restrain the operation of Miss. Code Ann. § 11-1-65 because Mississippi may not punish or deter Cooper Tire for conduct outside Mississippi. These principles, permitting only vindication of Mississippi's interests, impose a clear constitutional limitation on the evidence a jury can hear in the second phase of a bifurcated trial. Evidence touching on the factors in Miss. Code Ann. § 11-1-65 that was not limited to the state of Mississippi taints the award because to the extent the jury heard evidence of Cooper's activities in other states and based its award on that conduct, the Mississippi jury effectively and improperly regulated conduct in other states.

Cooper submits that the $3,000,000 awarded in this case is grossly excessive in relation to any interest that the state of Mississippi might have in punishing and deterring a single act of simple negligence that occurred (if at all) at Cooper's Arkansas plant where plaintiffs' expert opined that a "weakness was built into" the subject tire. [Tr. 1038-40] Plaintiffs made no effort to restrict the evidence of Cooper's conduct to the state of

Mississippi. When plaintiffs offered evidence of Cooper's net worth and shareholders' equity, the amounts were not confined to the value of assets or earnings in Mississippi. [Tr. 1727] When they used Cooper's 1998 annual report to demonstrate that Cooper was involved in other litigation, counsel read a portion of the report stating that "the company has been listed in unrelated product liability actions in federal and state courts throughout the United States. . . . " [Tr. 1731] When plaintiffs' counsel questioned various witnesses about purported other claims, the "evidence" was not restricted to either claims by Mississippi residents or to tires manufactured in Mississippi. [Tr. 1386-89] The imposition of a punitive award of $3,000,000 under Mississippi law based on Cooper's conduct and its assets in other states runs directly contrary to the constitutional principles set forth in *BMW*, providing further grounds for reversal of the punitive damages award.

C. The punitive damages award violates the defendant's right to due process by placing inordinate emphasis on financial condition.

The purpose of the second phase of a bifurcated trial is not to introduce information on the defendant's net worth and then ask the jury to assess punitive damage. Such a procedure is constitutionally infirm. Section 11-1-65 places inordinate weight on the defendant's financial condition as a basis for awarding punitive damages. The undue emphasis this factor received in this case cannot be underscored any more strongly than by the fact that the only substantive evidence plaintiffs presented during the punitive damages phase of the trial

was Cooper's net worth – evidence that showed the depth of the defendant's pocket, not the nature of its conduct.

The United States Supreme Court has expressed profound concern that an inordinate focus on wealth will lead to awards based on prejudice. Thus, in *Pacific Mutual*, 111 S.Ct. 1032, the Court noted with approval that in Alabama "factfinder[s] must be guided by more than the defendant's net worth" and that plaintiffs "do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045. Subsequent to *Pacific Mutual*, the Court questioned the propriety of jury instructions that "authorize[ed] the jury to take account of the 'wealth of the perpetrator." *TXO Production*, 113 S.Ct. at 2723 (plurality opinion); *see Id.* at 2725 (Kennedy, J., concurring) (wealth evidence gives rise to "the jury's raw, redistributionist impulses stemming from antipathy to a wealthy out-of-state, corporate defendant"); *Id.* at 2739 (O'Connor, J., dissenting) (noting that defendant's "out-of-state status and large resources" may "unduly" influence the jury and such evidence creates "special dangers of bias"); *See also Honda Motor Co. v. Oberg*, 114 S.Ct. 2331, 2340-41 (1994) ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases").

The evidence, argument, and instruction in this case that explicitly directed the jury's attention to Cooper's wealth as a basis for measuring punitive damages permitted the jury to give vent to its "raw, redistributionist impulses." The evidence, argument, and instruction therefore were inconsistent with the plain guideposts set out by the United States Supreme Court,

requiring reversal of the entire award of punitive damages.

V. Mississippi's statutory penalty on appeals violates Cooper's constitutional rights to due process, equal protection, and open courts.

Cooper hereby specifically identifies as an issue and reserves its right to argue that Miss. Code Ann. § 11-3-23 is unconstitutional under the Constitutions of the United States and the state of Mississippi. Cooper's decision to appeal the multi-million dollar judgment against it was influenced by the potential penalty provided by Miss. Code Ann. § 11-3-23. This statute, which requires judgment against certain unsuccessful appellants at the rate of 15 percent of the judgment affirmed, has as its purpose the discouraging of frivolous appeals and providing a measure of compensation for successful appellees. *Walters v. Inexco Oil. Co.*, 440 So.2d 268, 274-75 (Miss. 1983). Because these goals are fulfilled by other provisions of Mississippi law and because § 11-3-23 is imposed "automatically" in every case whose circumstances meet its requirement, its application violates the constitutional rights of litigants to due process, equal protection, and open courts. Miss. Const. art. 3, §§ 14, 24. Should Cooper ever be subjected to the provisions of this statute in this action, Cooper will asserts that the statute cannot be applied because it is unconstitutional.

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SUPREME COURT OF MISSISSIPPI

COOPER TIRE & RUBBER COMPANY	**APPELLANT**
VS.	
TRUDYS TUCKIER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LAURA DAWN TUCKIER, DECEASED, AND AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES	**CAUSE NO. 2000-CA-00404** **APPELLEE**

MOTION FOR REHEARING

(Filed Jan. 24, 2002)

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* * *

ARGUMENT

1. Punitive damages are subject to constitutional scrutiny not applied here.

In a case decided after this case was briefed, the United States Supreme Court held that appellate courts reviewing punitive damages awards must utilize a *de novo* standard of review to ensure that the award does not deny due process guaranteed by the United States Constitution. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001). This standard was not utilized here.

The United States Supreme Court has expressed serious concern that punitive damages in this country have "run wild," *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), and this Court's majority opinion reinforces that conclusion.[1] Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for a loss but "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter reoccurrence.'" *Browning-Ferris Indus. Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). They are "windfall recovery" for plaintiffs, *City of Newport v. Fact Concerts Inc.*, 453 U.S. 247 (1981) (Brennan, J., dissenting), and as many forms of punishment, "engender adverse social consequences,"

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[1] *See generally*, Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform By Courts and Legislatures*. 65 Brook L. Rev. 1003 (2000); Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study On Enterprise Responsibility For Personal Injury: A Timely Call For Punitive Damages Reform*, 30 San Diego L. Rev. 263 (1993); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform – State Legislatures Can And Should Meet The Challenge Issues By The Supreme Court Of The United States in Haslip*, 42 Am. U.L. Rev. 1365 (1993).

Addington v. Texas, 441 U.S. 418, 425-26 (1979), with "potentially devastating" ramifications, *Browning-Ferris,* 492 U.S. at 281. Punitive damages also "pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994) (reversing punitive damages award because state law limited judicial review of such awards).

The United States Supreme Court has held in a series of decisions that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the amount of punitive damages and procedural limits on when and how punitive damages may be awarded. *See BMW of North America v. Gore,* 517 U.S. 559, 585-86 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 458 (1993); *Honda v. Oberg,* 512 U.S. at 432; *Cooper Indus. v. Leatherman Tool Group,* 121 S.Ct. 1678. Thus, constitutional limits apply both to "when" and "how much" in the realm of punitive damages. Although the States are given broad discretion in imposing punitive damages, the Due Process Clause "prohibits a state from imposing a 'grossly excessive' punishment on a tortfeasor." *Gore,* 517 U.S. at 580; *TXO*, 509 U.S. at 454; *Cooper,* 121 S.Ct. at 1684.

Three guideposts demanded by due process were adopted in *Gore* for determining whether a punitive damage award is constitutional. Recognizing that punitive damages "pose an acute danger of arbitrary deprivation of property" especially where, as here, "presentation of evidence of the defendants' net worth creates potential that juries will use their verdicts to express biases against big businesses," *Oberg,* 512 U.S. at 431-32, the Court required review of the size of punitive damages awards based on (1) the reprehensibility of the defendant's

conduct, (2) the relationship of the compensatory damages to the punitive damages, and (3) the relevant civil or criminal fines applicable to the same conduct.

The constitutional scrutiny became even more intense in *Cooper Industries,* which held that in reviewing awards of punitive damages, appellate courts should undertake a "thorough, independent review" of the *Gore* factors, 121 S.Ct. at 1685, and "must review the proportionality determination *'de novo'*. . . . " *Id.* The Court held that this more careful review is necessary to guarantee the core protection that the Due Process Clause accords to parties punished by punitive damages: fair notice of the size of any potential punishment and the "uniform treatment of similarly situated persons." The holding in *Cooper Industries* reinforces the fundamental principle of certainty desperately needed in today's litigious society because *de novo* review tends to unify precedent and stabilize the law. In *Cooper Industries,* this *de novo* review "reveal[ed] a series of questionable conclusions by the district court," 121 S.Ct. at 1688, similar to the conclusions that should have been revealed in this case. The Supreme Court made it crystal clear that a jury's determination of the appropriate amount of punitive damages should be given *no* deference whatsoever by an appellate court.[2] This rule alone mandates rehearing in this case.

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[2] *Cooper* was immediately recognized for this important development. The ABA Journal noted, "The 8-1 ruling virtually invites appeals courts to second-guess the jury when it awards punitive damages." Savage, *Slicing Punitives: Justices Back De Novo of Awards in Pocket Tool Case,* 87 A.B.A.J. 22 (July 2001).

In *Cooper Industries,* quoting Justice Breyer's concurring opinion in *Gore,* the Court emphasized the fundamental due process interests that underlie the third *Gore* factor:

> Requiring the application of law, rather than a decision maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.

121 S.Ct. at 1685 (quoting *Gore,* 517 U.S. at 587). The Court explained that the "legal comparison" of a punitive damage award to the relevant fine is "more suited to the expertise of appellate courts" than it is to the trial court, and that "[c]onsiderations of institutional competence" therefore argue strongly against a "deferential appellate review." *Id.* at 1688.

2. The majority opinion did not consider core constitutional issues.

This Court has ignored *Cooper Industries* here and also in *American Income Life v. Hollis,* 2001 W.L. 695516 (Miss. June 21, 2001, another post-*Cooper Industries* decision in which the Court explicitly used an abuse of discretion standard to review a punitive damages review.

This Court did not apply the standard of review mandated by *Cooper Industries* and, though paying lip-service to *Gore* on the ratio question, stated that a ratio of 150 to 1 was acceptable. Rather than conduct a *de novo* review, the Court relied on the jury's presumed conclusion that Cooper was guilty of "actual malice, gross negligence which evidence a willful, wanton or reckless disregard for

the safety of others, of . . . actual fraud" because of the testimony of two witnesses, without personal knowledge of the relevant facts, who testified that Cooper used "bad stock." This vividly demonstrates the need for a *de novo* review because "bad stock." This vividly demonstrates the need for a *de novo* review because "bad stock" is simply a "buzz word," as Justice Smith pointed out in dissent. a *de novo* probe of the record demonstrates that "bad stock," (whatever that means) was not proven by a preponderance of the evidence and certainly not by the required "clear and convincing" evidence. What *de novo* review of the first *Gore* factor requires is not an evaluation of whether [there] was "some evidence" to satisfy the punitive liability standard, but rather, a searching evaluation of the record to determine the "degree" to which defendant's conduct was reprehensible if it was.

The Court completely ignored the third *Gore* factor, comparison of the punitive award to legislative fines or penalties for comparable misconduct. As held in *Gore,* in determining whether an award of punitive damages is excessive, reviewing courts must "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." 517 U.S. at 583. Indeed, in *Cooper Industries,* the Supreme Court emphasized the importance of the third *Gore* factor in rejecting a more deferential standard of review. 121 S.Ct. at 1688. Instead of applying the *Gore* factors, this Court justified the punitive award by accepting plaintiffs' argument that it could rely on two factors designed to *inflate* punitive damages – the "potential harm" and the "wealth" of the defendant.

A comparable fine under the third *Gore* factor, Miss. Code Ann. § 75-24-1 *et seq.* (2000), deals with unfair or

deceptive trade practices. Section 75-24-5 provides that the following is a deceptive trade practice: "(g) Representing that goods – are of a particular standard, quality or grade – if they are of another." The statute, § 75-24-20, provides a criminal penalty of $1,000 for a misdemeanor conviction, or if the Mississippi Attorney General elects to file a civil action, he may recover a civil penalty not to exceed $10,000 per violation if he proves by clear and convincing evidence knowing and willful use of any unfair or deceptive trade practice. Half of such penalty goes to the General Fund and half to the Office of Consumer Protection under § 75-24-19. The punitive damages award here is 3000 times the maximum criminal fine for the same acts alleged to have been committed by Cooper Tire and 300 times the maximum civil penalty that the State could recover.

The United States Supreme court has permitted consideration of "potential harm" only when the defendant engaged in *intentional, highly reprehensible* misconduct which, for some reason unrelated to the defendant's actions, failed to produce the harm the defendant intended. Thus, in *Gore,* the Supreme Court noted that it had upheld a large punitive award in *TXO,* where a fraudulent scheme was interrupted before it could be completed. 517 U.S. at 581 & n.34. The "potential harm" the Court considered was the difference between the actual harm "and the harm to the victim that would have ensued if the tortious plan had succeeded." *Id.* at 581. In *TXO* itself, the plurality opinion stated that it was "appropriate to consider . . . the potential harm . . . to [defendant's] intended victim." 509 U.S. at 460. As an appropriate "potential harm" case, the *TXO* opinion cited an instance where "a man wildly fires a gun into a crowd

. . . and the only damage is to a $10 pair of glasses." *Id.* at 459. There is no conceivable argument based on this record that Cooper Tire engaged in such a deliberate "tortious plan" or had an "intended victim."

3. The Court's failure to apply the "clear and convincing" standard to the proof supporting punitive damages violates Due Process.

Under Miss. Code Ann. § 11-1-65, plaintiffs were required to establish their claim for punitive damages with *clear and convincing evidence* that Cooper acted with gross negligence evidencing a willful, wanton or reckless disregard for the safety of others. This evidentiary standard does not permit submission of a punitive damages case to the jury where, in the words of this Court, the proof "is not of such a real and substantial nature that impartial men of sound judgment could reasonably believe it." *Aponaug Mfg. Co. v. Collins,* 42 So.2d 431 (Miss. 1949). Yet, the majority opinion acknowledges that the plaintiffs' entire case, including the case for punitive damages, was built on the credibility of two witnesses whose testimony was neither real nor substantial. These disgruntled former employees of Cooper testified in response to leading questions on direct examination that they had personal knowledge of Cooper's use of "bad stock" at the time the subject tire was manufactured yet, under cross examination, recanted both their knowledge and their ability to know anything about tire building at the relevant time.[3]

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[3] Cooper maintains that the issue is not mere credibility because a witness's personal knowledge is a requirement for admissibility under Miss. R. Evid. 602, not a matter to be weighed by the jury. Jimmy Oats testified that he never worked as a rubber compounder or a "chemical

(Continued on following page)

The majority accepted the equivocating testimony of these two witnesses as showing not only what they supposedly knew, but also attributed the "knowledge" of these low level former employees to Cooper, thus establishing its knowledge as an element of "willful, wanton or reckless" disregard for safety.

The majority thus used this testimony alone to establish the elements of plaintiffs' claim under the MPLA and their claim for punitive damages, affirming both awards of damages because "the jury found the Tuckiers' witnesses and testimony to be more persuasive and more credible." ¶ 44. Slip Op. Who exactly committed the requisite "willful, malicious or reckless" wrong required under 11-1-65 to support a punitive award? Even Oates and Angel did not establish a company policy to push through "bad stock." They pinned this allegation to an isolated unnamed line supervisor but acknowledged company policy forbade the use of restricted or out-of-date stock. There was no evidence that Cooper as a corporate entity fostered or

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person," positions that were held by "company men" with specialized training. [Tr. 870] Oats admitted that because the subject tire was built in 1992, he wouldn't have been involved in its building. [Tr. 877] He testified that in 1992 "I was working in the mill room, and I wasn't up on the other end." [Tr. 890] Richard Angell was asked whether he had personal knowledge of use of "out of spec" material in tire building at any time in the 1990's. His response, by deposition, was: "Well, in the 1990's, I was operating a bias cutter machine, body ply bias, so no, I don't have knowledge. I don't have that knowledge." [Tr. 957] When asked whether he knew of any tire getting past the inspectors "without spec material in it," Angell testified, "[i]t would be hard for me to know that." [Tr. 958] He admitted that he wouldn't have known if a "bad tire" got out of the plant because he was never employed as an inspector. [*Id.*] As he candidly admitted, "But do I know that one left the plant? No, I don't know that." [Tr. 959]

encouraged this conduct, even assuming it ever occurred. Angell and Oates conceded that employees could be and were reprimanded by plant management if caught using restricted or out-of-date stock. As a matter of law, this is not "clear and convincing."

Even if such evidence – "more persuasive and more credible" than the opposing evidence – constitutes a "preponderance," it certainly was not "clear and convincing." Clear and convincing requires evidence that is more than merely persuasive or credible, yet that was the standard applied by the majority, both in its review of the liability verdict and the findings supporting punitive damages. Error in basing a punitive damages award on plaintiffs' incompetent testimony and on the jury's 9 to 3 verdict is a deprivation of due process under the Mississippi and United States Constitutions.

The United States Supreme Court has described the clear and convincing standard for proof of facts supporting an award of punitive damages as "an important check against unwarranted imposition of punitive damages." *Honda Mtr Co. v. Oberg,* 512 U.S. 433, 114 S.Ct. 2331, 2341 (1994). The failure of this safeguard in the present case is apparent from the quality of evidence that this Court so uncritically accepted, first as satisfying a preponderance and then, without further analysis, as constituting clear and convincing proof.

A review of some judicial definitions of "clear and convincing" demonstrates that it requires more than the evidence presented here. The Alabama Code providing for awards of punitive damages contains the following definition of clear and convincing evidence: "Evidence that,

when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." ala. code § 6-11-20(b)(4). A justice of the Supreme Court of Georgia urged his court to adopt the Alabama definition in a punitive damages case, *Clarke v. Cotton,* 440 S.E.2d 165 (Ga. 1994) (Jackson, J., concurring), and provided further elucidation of the standard: "In this regard, 'clear and convincing evidence' has been defined as evidence having a 'high capability of inducing belief,' . . . such that 'the fact finder's mind is left with an abiding conviction that the evidence is true.'" *Id.* (citations omitted). The Florida Supreme Court has held that

> [c]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established.

Florida v. Mischler, 488 So.2d 523, 525 (Fla. 1986) (*citing Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983)). The Massachusetts Supreme Judicial court rejected assigned error in an instruction charging jurors that "[t]he word 'convincing' after the word 'clear' – 'clear and convincing' – suggests to me that there should not be too much room for argument among reasonable men and women under the standard. . . . " The court held this explanation to be equivalent to the court's previous formulations of the standard as "strong, positive and free from

doubt" and "full, clear and decisive." *Callahan v. Westinghouse Broadcasting Co.*, 363 N.E.2d 240 (Mass. 1977). Finally, the United States Supreme Court has approved a definition as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

Each of these descriptions of the clear and convincing standard focus on the firmness of the jurors' conviction that the evidence presented is true, a conviction derived from proof that is certain, clear, positive, and strong. And this evidence of truth must be more than a preponderance. There is no such evidence in this case. The majority's absolute deference to the jury's credibility call on the liability issue as proving the elements of a punitive damages case by clear and convincing evidence deprives Cooper Tire of the safeguards embodied in Miss. Code Ann. § 11-1-65.

* * *

6. Mississippi's penalty on appeals is an excessive fine when applied to a punitive damages judgment and further violates constitutional rights to due process, equal protection, and the right to open courts.

In its opening brief, Cooper Tire expressly stated and reserved its right to argue the following issue: "In the event Miss. Code Ann. § 11-3-23 is applied to Cooper, whether this statute violates Cooper's constitutional rights." This Court's affirmance of the judgment against Cooper, implicating § 11-3-23, does not address Cooper's

assertion that § 11-3-23 is unconstitutional under the Constitutions of the United States and the State of Mississippi. This argument should be addressed on rehearing.

Section 11-3-23, which requires judgment against some, but not all, unsuccessful appellants at the rate of an additional 15 percent of the judgment affirmed, is a fine on a fine when applied to the punitive damages award in this case. It is unconstitutionally excessive fine within the meaning of Miss. Const. Art. 3 § 28 and the Eighth Amendment to the United States Constitution. It also is a windfall for plaintiffs and/or their counsel in view of the fact that they relied on the same evidence to prove both compensatory and punitive damages and presented virtually no evidence during the punitive damages phase of trial. The penalty thus is unrelated to plaintiffs' actual expenditures of money and time. An award of 15 percent of the compensatory damages alone will be generous compensation – about $50,000, An additional 15 percent of the $3 million punitive damages award is arbitrary and unconscionable.

Section 11-3-23 also is unconstitutional because it violates the rights of litigants to due process, equal protection, and open courts. U.S. Const. 14th Amend; Miss. Const. art. 3, §§ 14, 24. The purpose of the statute is the discouraging of frivolous appeals and providing some compensation for the time and costs expended by successful appellees. *Walters v. Inexco Oil Co.*, 440 So.2d 268, 274-75 (Miss. 1983). Because these goals are fulfilled by other provisions of Mississippi law and because § 11-3-23 is imposed "automatically" in every case whose circumstances meet its requirement, the statute lacks a rational basis and rational relation to the State's interests and chills the right to litigate in Mississippi's appellate courts.

By its own terms, the statute discriminates among appellants. "It does not apply to the plaintiff who unsuccessfully appeals an adverse judgment or to the unsuccessful cross-appellant." *Bankers Life,* 108 S.Ct. at 1657 (Blackmum, J., dissenting).[6] However, neither the unsuccessful appellant's ability to pay, the amount of the judgment, nor the merit of his appeal is considered: the penalty is automatically assessed. *See Cornelius v. Overstreet,* 757 So.2d 332, 335 (Miss. App. 2000) (charging penalty against unsuccessful appellant although penalty not requested). Only judgments that are unconditionally affirmed result in imposition of the penalty; the least modification by the Court, even on a technical, nonsubstantive point, precludes the penalty. It discriminates on its face against landowners in condemnation cases. These distinctions lack a rational basis, depriving appellants like Cooper Tire of due process and equal protection of the law.

Although § 11-3-23 has survived constitutional challenges,[7] the basis for the finding of the constitutionality has been abrogated by the enactment of other, less draconian statutes which fulfill the purported purposes of § 11-3-23. The Mississippi Rules of Civil Procedure, Mississippi Rules of Appellate Procedure, and various other statutory enactments now provide an arsenal of monetary awards to prevailing parties, both as a matter of course and in

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[6] In 1978, in *Wallace*, this Court found no discrimination under Section 11-3-23 "because all unsuccessful appellants, whether plaintiff or defendant, are subjected to [then] five percent damages where the judgment or decree appealed from permits recovery." 360 So.2d at 933. This statement is simply incorrect. *Wallace* does not preclude a holding that Section 11-3-23 is unconstitutional.

[7] *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Wallace v. Jones,* 360 So.2d 932 (Miss. 1978).

instances in which a position is found to be frivolous or unjustified.[8] In *Bankers Life*, the United States Supreme Court considered an equal protection challenge to § 11-3-23 under the Fourteenth Amendment to the federal constitution. The majority held that the penalty statut did not violate equal protection, only because it was "reasonably related to the achievement of the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources." 486 U.S. at 85.

Justice Blackmun's dissenting opinion found little to support the majority's finding and foresaw that § 11-3-23 was, even then, being supplanted by other rules and statutes more "reasonably related" to the State's objectives. As Justice Blackmun wrote,

> The statute arbitrarily discriminates against defendant/appellants of money judgments, and the State offers no justification for the distinction so drawn.
>
> Not surprisingly, then, the Court makes no attempt to justify § 11-3-23 based upon the "compensation" objective, despite its reference to that state interest. Instead, it upholds the penalty statute as reasonably related to Mississippi's interest in discouraging frivolous appeals and thereby protecting the Mississippi Supreme Court "from being required to spend its time and energy and resources on appeals thoughtlessly

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[8] *See* Mississippi Rule of Appellate Procedure 36; Miss. Code Ann. § 75-17-7; Miss. Code Ann. § 11-53-55; Mississippi Rule of Civil Procedure 11; Mississippi Rule of Appellate Procedure 38; Mississippi Litigation Accountability Act of 1988, Mississippi Code Ann § 11-55-1, *et seq*.

> taken. . . . In *Lindsey v. Normet,* 405 U.S. 56, 92 S.Ct. 862, 31 L. Ed.2d 36 (1972), the Court explained that a State might adopt "reasonable procedural provisions . . . to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, at 78, 92 S.Ct., at 877. But § 11-3-23 does not meet this standard. The penalty is neither applied in a uniform and nondiscriminatory manner, nor reasonably tailored to discourage "patently insubstantial appeals."
>
> Section 11-3-23 does not permit the Mississippi Supreme Court to determine whether an appeal is frivolous; the 15 percent penalty is imposed on certain unsuccessful appellants whenever the judgment is affirmed, regardless of the substantial merit of the appellant's case. Thus, even if, as in this very case, a money judgment is affirmed by a narrow 5-4 majority of the Supreme Court, the assessment is automatically made. Such a provision obviously sweeps substantial appeals as well as frivolous appeals within its deterrent net.

486 U.S. 91-92, 108 S.Ct. 1657-58.

Now litigants are offered a panoply of remedies for awarding costs, interest, and sanctions against unsuccessful parties. The continuing validity of the "automatic" assessment under Section 11-3-23 is no longer justifiable. On rehearing, this Court should address this anachronism in the law and hold that it is unconstitutional and unenforceable

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF PANOLA COUNTY, MISSISSIPPI

TRUDYS TUCKIER, INDIVIDUALLY, ET AL.

PLAINTIFFS

VS. CAUSE NO. CV-97-64-C(P1)

COOPER TIRE AND RUBBER COMPANY

DEFENDANT

JURY INSTRUCTION 4

(Filed NOV 1 1999)

The Court instructs the jury that punitive damages may not be awarded if the Plaintiffs do not prove by clear and convincing evidence that the Defendant against whom punitive damages are sought acted with actual malice or gross negligence which evidences a willful, wanton or reckless disregard for the safety of others.